(1)

FILED
JUL 19 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

31465 #27
KEE-KEE

Nos. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF BLOOMFIELD VILLAGE DRAIN DISTRICT AND BLOOMFIELD NO. 1 STORM SEWER DRAIN DISTRICT,

Petitioners,

vs.

BLOOMFIELD VILLAGE DRAIN DISTRICT, BLOOMFIELD NO. 1 STORM SEWER DRAIN DISTRICT, ETC., ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RAYMOND J. DYKEMA,
DAVID M. WOOD,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writs of certiorari	1
Opinions below	2
Basis of jurisdiction	2
Summary statement	2
Questions presented	8
Reasons relied upon for allowance of writs	10
Brief in support of petition	14
Opinions below	14
Jurisdiction	14
Statement of the case	15
Specification of errors	15
Argument	15
1. Denial of due process by holding bondholders barred from all remedies on their bonds by decrees in taxpayers' suits	16
2. Circuit Court of Appeals did not decide issues in accordance with local law	23
Rejection by Court of Appeals of local interpretations of drain statute as to character of improvement drain commissioner was authorized to construct	24
Rejection by Court of Appeals of local authorities as to the effect of bond recitals	26
Error of Court of Appeals in holding duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed	35
Error of Court of Appeals in ignoring effect of statute prohibiting collateral attack on the drain proceedings	36

(32546

Page

Error of Court of Appeals in failing to award bondholders money in the bond redemption fund 41
3. Error of Circuit Court of Appeals in refusing to restrain use of taxpayers' decree to impede tax collections 42
Conclusion 44
Appendix follows page 44 1

TABLE OF CASES CITED.

American Surety Co. v. *Baldwin*, 287 U. S. 156 24
Baker, et al. v. *Ruddiman Valley No. 3 Drain District* (unreported) 10, 31
Bates v. *City of Hastings*, 145 Mich. 574 ..... 10, 28
Bernard Twp. v. *Morrison*, 133 U. S. 523 ..... 33, 34
Brooks v. *Oakland County*, 268 Mich. 637 ..... 12, 42
Chase National Bank v. *City of Norwalk*, 291 U. S. 431 ..... 9, 12, 15, 19, 42
Chelsea Savings Bank v. *Ironwood*, 130 Fed. 410 42
Chemical Bank & Trust Co. v. *County of Oakland*, 246 Mich. 673 34
City of Akron v. *Barber Asphalt Co.*, 171 Fed. 29 42
City of Defiance v. *Schmidt*, 123 Fed. 1 33
Coler v. *Dwight School Twp.*, 3 N. Dak. 249 ..... 29, 33
Common Council v. *Schlich*, 81 Mich. 405 ..... 10, 28
Cummings v. *Garner*, 213 Mich. 408 40
Detroit v. *Township of Redford*, 253 Mich. 453 21
Detroit Fire & Marine Insurance Co. v. *Oakland County*, 284 Mich. 130 ..... 18, 24
Detroit Trust Co. v. *Dingman*, 291 Mich. 170 ..... 7, 10, 24
Dixon County v. *Field*, 111 U. S. 83 34
Douglas v. *Pike County*, 101 U. S. 677 37
Donohue v. *Russell*, 264 Mich. 217 ..... 11, 38
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64 23
Fetzer v. *Johnson*, 15 F. (2d) 145 ..... 9, 12, 42
First Wisconsin National Bank v. *Bessemer Twp.*, 286 Mich. 426 33
Florida R. R. Co. v. *Shutte*, 103 U. S. 118 18
Godkin v. *Rutterbush*, 147 Mich. 116 20

Page

Gray v. *Dingman*, 279 Mich. 62 ..... 38, 41
Great Northern Railroad Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 37
Hackett v. *Ottawa*, 99 U. S. 86 28
Hansberry v. *Lee*, 311 U. S. 32 ..... 10, 14, 17
Heliker v. *Oakland County*, 216 Mich. 593 40
Jacobson v. *Miller*, 41 Mich. 90 20
Kent v. *Dana*, 100 Fed. 56 29
Kennedy v. *Dingman*, 272 Mich. 24 ..... 10, 24
Kersh Lake Drainage District v. *Johnson*, 309 U. S. 485 ..... 21, 22
Kinner v. *Spencer*, 257 Mich. 142 20
Koen v. *Beardsley*, 63 F. (2d) 595 32
Leroy v. *Collins*, 165 Mich. 380 20
David A. Manville & Co. v. *Frances Oil & Refining Co.*, 20 F. (2d) 473 32
Meyering Land Co. v. *Spencer*, 273 Mich. 703 ..... 18, 24
National Life Insurance Co. v. *Board of Education*, 62 Fed. 778 29
New England Mutual Life Ins. Co. v. *Mitchell*, 118 F. (2d) 414 23
Norton v. *Cockerill*, 265 Mich. 405 ..... 31, 42
Pendleton v. *Russell*, 144 U. S. 640 19
Pittsburgh, etc., Iron Co. v. *L. S. Iron Co.*, 118 Mich. 109 ..... 11, 38
Portsmouth Savings Bank v. *Ashley*, 91 Mich. 670 34
Riggs v. *Johnston County*, 6 Wall. 166 43
Risley v. *Howell*, 64 Fed. 453 29
Royal Oak Drain District v. *Keefe*, 87 F. (2d) 786 ..... 20, 24
Schmid v. *Village of Frankfort*, 131 Mich. 197 ..... 10, 28
Smith v. *Carlow*, 114 Mich. 67 24
Southern Railway Co. v. *Walters*, 284 U. S. 190 14
Spitzer v. *Village of Blanchard*, 82 Mich. 234 33
State of Minnesota v. *National Tea Co.*, 309 U. S. 551 18
State Tax Commission v. *Van Cott*, 306 U. S. 511 18
Stellwagen v. *Dingman*, 229 Mich. 159 ..... 11, 40
Stringfellow v. *Atlantic Coast Line R. R. Co.*, 290 U. S. 322 14
Stryker v. *Goodnow*, 123 U. S. 527 19

Page

Taylor v. *Ypsilanti*, 105 U. S. 60 37
Thompson v. *Village of Mecosta*, 127 Mich. 522 ..... 10, 28
Thompson v. *Emmett Irrigation District*, 227 Fed. 560 41
Twp. of Clarence v. *Dickinson*, 151 Mich. 270 11
Twp. of Norton v. *Cockerill*, 265 Mich. 405 12
Twp. of Swan Creek v. *Brown*, 130 Mich. 382 24
Twp. of Warren v. *Engelbrecht*, 251 Mich. 608 41
Union Pacific R. R. Co. v. *Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160 18
United States v. *Council of Keokuk*, 6 Wall. 514 43
Vandenbark v. *Owens-Illinois Glass Co.*, 311 U. S. 635, 61 Sup. Ct. 347 26
Vickery v. *Sioux City*, 104 Fed. 164 41
Village of Clawson v. *Van Wagoner*, 268 Mich. 148 .. 12, 13, 23
Village of Oak Park v. *Van Wagoner*, 271 Mich. 450, 12, 13, 23
Waite v. *Santa Cruz*, 89 Fed. 619 29
Waltz v. *Reliance Insurance Co.*, 221 Mich. 345 19
Welch v. *City of Lincoln Park*, 268 Mich. 440 20
West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 Sup. Ct. 179 ..... 15, 31
Western & A. R. R. v. *Henderson*, 279 U. S. 639 14
William Lane, Inc., v. *Selby Shoe Co.*, 45 F. (2d) 581 32
Willis v. *Board of Commissioners*, 86 Fed. 872 42
Wuchter v. *Pizzutti*, 276 U. S. 13 ..... 14, 21

STATUTES AND AUTHORITIES CITED.

A. L. R., Volume 9, p. 856 40
Volume 86, p. 1086 28
Constitution of the State of Michigan, Art. VIII, Sec. 15a 3
Constitution of the United States:
Fifth Amendment 8, 10, 16
Fourteenth Amendment 16
Corpus Juris, Volume 44, p. 1253, Art. 425 28
Dillon, Municipal Corporations, 5th Ed., Art. 952 26
Judicial Code:
Section 24 (28 U. S. C. 41) 14
Section 240a (28 U. S. C. 347) 2, 14

Page

Michigan Compiled Laws:
1929, Sec. 4902 11
1929, Sec. 4927 12
1929, Sec. 4938 11
Michigan Drain Law:
Chap. VI, Sec. 11 11
Chapter X:
Sec. 5 12
Sec. 15 3
Sec. 16 11
Michigan Public Acts:
1923, Ch. 10, Sec. 14, Act 316 ..... 11, 12, 20
1927, Act 331 ..... 11, 35
McQuillan, Municipal Corporations, Vol. 6 (Revised), Art. 2497, 2502 28
R. C. L., Volume 19, p. 1018, Art. 311 28

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF BLOOMFIELD VILLAGE DRAIN DISTRICT AND BLOOMFIELD NO. 1 STORM SEWER DRAIN DISTRICT,

Petitioners (Appellees Below),

vs.

BLOOMFIELD VILLAGE DRAIN DISTRICT, BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, PUBLIC QUASI CORPORATIONS OF OAKLAND COUNTY, MICHIGAN; COUNTY OF OAKLAND, A MUNICIPAL CORPORATION OF THE STATE OF MICHIGAN; CHARLES W. SPARKS, COUNTY TREASURER OF OAKLAND COUNTY; LYNN D. ALLEN, COUNTY CLERK OF OAKLAND COUNTY; EARL L. CLARK, DRAIN COMMISSIONER OF OAKLAND COUNTY; CALVIN N. SMITH, ROBERT Y. MOORE AND W. H. MORLEY, BOARD OF AUDITORS OF OAKLAND COUNTY; BOARD OF SUPERVISORS OF OAKLAND COUNTY, PERRY A. VAUGHAN, SUPERVISOR OF THE TOWNSHIP OF BLOOMFIELD; DAVID E. ANDERSON, TREASURER OF THE TOWNSHIP OF BLOOMFIELD; JOHN J. O'HARA, AUDITOR GENERAL OF THE STATE OF MICHIGAN; INTERNATIONAL REALTY COMPANY, INC., A MICHIGAN CORPORATION, and OAKLAND HILLS COUNTRY CLUB,

Respondents (Appellants Below).

PETITION FOR WRITS OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners pray that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Sixth Circuit entered March 14, 1941, reversing a judgment of the District Court of the United States

for the Southern District of Michigan entered September 11, 1939. (Two decrees were entered by the Court of Appeals by reason of separate appeals to that court from the same judgment of the District Court, there being but one case in the District Court.)

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record.)

Opinions Below.

The opinion of the District Court (131) confirms a master's report (69). The opinion of the Circuit Court of Appeals (450) was rendered March 14, 1941.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

Decrees of the Circuit Court of Appeals were entered March 14, 1941. Petition (464) for rehearing was filed April 9, 1941, and denied May 9, 1941, without opinion (505). Issuance of mandate was stayed by order of that court dated May 15, 1941, for thirty days, pending the application for writ of certiorari in this court.

Summary Statement.

The suit in general involves the question of the right of petitioners, and others of the class for whom suit was brought, to enforce two issues of bonds aggregating $675,000.00, issued by two Michigan Drain Districts,—Bloomfield Village and Bloomfield No. 1 Storm Sewer Drain District.

In Michigan, drain proceedings are conducted by a County officer, the Drain Commissioner, under authority of a law from which we have copied applicable provisions in the appendix (p. 1). The proceedings are instituted by a

petition of land owners for the creation of a taxing district, followed by a petition for the location and establishment of a drain within the district. A finding of necessity must be made by an independent tribunal convened by the County Probate Court. Assessments to defray construction costs are levied against lands in the district, and may also be levied against the state, county and townships for benefits to roads and other public property. Such assessments may be divided into annual installments, and bonds may be issued in anticipation of the collection thereof. Authority is given to drain districts to issue bonds by Article VIII, Section 15(a) of the State Constitution, which provides: "Any drainage district established under provisions of law may issue bonds for drainage purposes within such district," and by Section 15, Chapter X, of the Drain Law (p. 11 Appendix). Taxes are collected, and if delinquent, enforced as general property taxes through the regular collection and enforcement agencies. Notice by publication, and in some instances personal service, is given of each important step in the proceedings. A review of any question involving any step in the proceedings is provided by certiorari, which must be taken within ten days after the final order of determination, the last step in the proceedings except the issuance of bonds, letting of contracts and confirmation of assessment roll. An appeal from assessment may also be taken within ten days after confirmation of the roll. Except for certiorari and appeal, the statute forbids any other attack on the proceedings, the legality of the drain, or taxes levied therefor. As taxes are collected from taxpayers, they are placed in a bond redemption fund in the County treasury, and can be used only to service the bonds. Under some conditions the County is obliged to advance moneys to the redemption fund in case of deficiency, to be reimbursed by later collections of drain taxes. If the amount originally levied is

insufficient to pay the cost of the drain and bonds that have been issued, an additional levy is required. No prescribed form of drain is required, nor is it restricted to storm water. Cities, villages and townships may use it for sewage disposal, and sewage disposal and purification plants may be built in connection with it.

The bonds in question were issued in proceedings strictly conforming to the Drain Law (421), and were sold by the district to investment houses at par or better. The investment houses almost immediately resold them to the public. With the money received the officers built the drains, which now have been in use for over sixteen years. Until May, 1931 maturing interest has been met, and $125,000.00 principal amount of bonds of the two districts paid. Tax collections were made and substantial surpluses in the bond redemption funds accumulated. In November, 1931 County officers suspended interest payments, and the following year suspended tax collections. Objection to payment of the bonds and levy of taxes is based upon the claim that the improvements were designed and built with the intention that they should serve the dual purpose of removing surface water and sanitary sewage, and that because of this underlying purpose the Drain Commissioner lacked jurisdiction. The proceedings, however, disclosed no purpose other than drainage, and the improvements contain no appurtenances or features exclusively intended for sanitary sewerage (284, 289). They are underground conduits with numerous inlets for the reception of surface water, and of sufficient capacity to transport surface water in times of heavy storms.

The bonds contain recitals (50, 52) that they were issued for the building of the named drains, compliance with the drainage laws specified, and the due happening, existence and performance of all conditions precedent to make them legal and binding obligations.

Petitioners filed their bill (1) in the District Court, alleging the following: Facts necessary to confer jurisdiction on the District Court by reason of diverse citizenship, the proceedings for the building of the drain, the issuance and good faith purchase of the bonds of the Bloomfield Village Drain District, default and refusal to pay, diversions from the sinking fund, refusal to levy taxes, and existence of a suit by a taxpayer to prevent the levy of assessments against its lands. The relief prayed was: Payment of bonds and interest thereon, mandatory injunction to compel the levy of taxes, and maintenance of sinking fund, restraint of diversions from sinking fund, and restraint against taxpayer from using any decree it might obtain to impede the collection of taxes. Another taxpayer was later added (VI), and later an amended and supplemental bill was filed as authorized by the court (39), which broadened the allegations of the original bill to include allegations with respect to both issues of bonds, and to bring before the court the fact that pending the suit taxpayers Meyering Land Company, International Realty Company and Oakland Hills Country Club had obtained a decree in the State Supreme Court (54) which in terms declared assessments against their lands void, and enjoined officers from levying taxes thereon. The relief prayed was substantially the same as in the original bill, except that it included relief as to both issues of bonds, the advancement of moneys by the County to make good deficiencies in the sinking fund as required by Act 331, Michigan Public Acts 1927, and prayed an injunction against the above named taxpayers from using the decree which they had obtained to impede the collection of taxes. Respondents' answers consist of a denial of the validity of the bonds and taxes on the ground that the improvements were not drains, and assert that by reason of that fact no rights accrued to bondholders.

The court referred the case to a master, who took testimony from which (176, *et seq.*) the nature of the improvements, and the motives actuating the Drain Commissioner and his engineers in designing and building the improvements, are disclosed. During the taking of proofs a claim was made that bondholders had participated in the suit brought by taxpayers in the State court (364). The only facts concerning this alleged participation appear on pages 365 and 366, which show that a short time prior to the hearing of taxpayers' suit in the State Supreme Court the attorney representing the County and its officers, who were defendants in that suit, asked one of the attorneys appearing in this suit to assist in preparing a brief for the County and its officers in the State court, and that he gave such assistance. This was done solely in behalf of the parties to the record in the State court, and without direction by bondholders or the parties he represented in this case. Furthermore, he took no part in the trial of the case, produced no witnesses, and cross examined none. He merely attended the trial as a spectator. No evidence contradicting this testimony was given.

The master in his report concluded that the improvements were illegal in the light of certain Michigan court decisions, but that inasmuch as the bonds contained recitals importing compliance with the law and proper performance of all conditions precedent, they were valid in the hands of innocent holders. He held that the State court decree was not *res judicata* against bondholders, since they were not parties to the record in that case, and under Michigan law which he cited the decree could not operate against them. He further held that there was no obligation on bondholders' part to intervene in the taxpayers' suit (80, 81). Exceptions to the report were taken by defendants (108) on the ground that the master should not have held that the court had jurisdiction, should not have found that bond-

holders occupied the position of good faith holders, and should not have applied the estoppel rule. No exception was taken on the ground that he should have held the State court decree binding to any extent upon bondholders. Plaintiffs excepted to the finding that the improvements were illegal. The court overruled all exceptions (130) and filed a short opinion declaring his view that the bondholders were entitled to recover because of defendants' estoppel to plead the falsity of the bond recitals (131). A judgment was entered substantially as prayed (143), which declared the bonds valid, directed officers to levy and collect taxes, to maintain sinking funds, directed the County to restore diversions and to advance its general funds for the payment of the Bloomfield No. 1 bonds. It also restrained taxpayers (parties to the suit) from using the decree obtained in the State court to prevent officers from making tax levies. The principal defendants then appealed to the Circuit Court of Appeals, which, as noted above, reversed the judgment.

The opinion of the Court of Appeals (450) agrees with the District Court in its conclusion that it had jurisdiction, that bonds are held bona fide, and that the projects are illegal under Michigan law. It refuses to consider a decision of the Michigan Supreme Court, *Detroit Trust Co.* v. *Dingman*, 291 Mich. 170, holding that a Michigan drain commissioner has power to build drains for the removal of both storm water and sewage, holds that parties other than the drain districts are not obliged to recognize the bonds as legal, that the districts are not estopped by their bond recitals, and that the decree in the taxpayers' suit is *res judicata* against bondholders. The latter is not stated as an independent ground for reversal, but appears to be interwoven into the court's entire process of reasoning. It is embodied in the question which the court says it has for decision (456), "Whether when the Michigan courts have held that these particular projects and all proceedings

thereunder are void, the recitals in the bonds estop appellants, etc." The court had before it another issue which petitioners believe should have been considered in support of the judgment, i. e. the binding effect of the statutory provision forbidding collateral attack on drain proceedings, which petitioners believe was not considered because of the court's view that the bondholders were barred by a prior adjudication.

Questions Presented by This Petition.

The fundamental questions presented are:

1. Whether due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States has been denied petitioners, and other holders of these bonds, in deciding that decrees in a suit brought by taxpayers in the drain district against the Drain Commissioner and others, to which suits no bondholders were parties, were *res judicata* of issues relating to the validity of the bonds and remedies thereon, on the theory that the Drain Commissioner represented bondholders, so that all matters decided in such prior suit, or which might have been decided therein, were adjudications against bondholders.

2. Whether in applying the law of the State of Michigan a Federal court is not bound by the entire body of such law contained in the statutes and court decisions, under such rules of interpretation and construction as the court of last resort of the State would be obliged to follow. Subsidiary to this question are the following:

(a) Whether when the State court of last resort has by its last decision declared the powers of drain districts to build drainage improvements of a particular character, the Federal courts can reject such decision on the ground that it involved a different drainage improvement, and that the State court had not specifically overruled its prior decision relating to the same improvement.

(b) Whether when a State court of last resort has rendered decisions holding that a municipal corporation is estopped against *bona fide* holders of its bonds to plead that the bonds are issued for a purpose different than that which is recited in the bonds, such decisions can be rejected in the absence of a clear showing that such decisions have been overruled.

(c) Whether public officers and other public bodies charged with the duty of performing acts necessary to provide funds for the payment of municipal bonds are excused from performing such acts when liability of the issuing municipality rests upon estoppel.

(d) Whether when a State statute provides that there may be no collateral attack on proceedings for the construction of a drain, and decisions in force when bonds for such drain were issued interpret such statute to forbid collateral attack except where proceedings violate the constitution, such decisions can be rejected, it being the law of the State that rights which accrue under a statute as judicially interpreted must be judged in accordance with the same interpretation.

(e) Whether when the State law provides that moneys collected from drain taxpayers shall be used only for the purpose of paying bonds, and denies the right of taxpayers to recover the same, the money so collected and in the possession of the county as statutory custodian of the fund can be withheld from bondholders.

3. Whether the lower court has not rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit, in *Fetzer* v. *Johnson*, 15 F. (2d) 145, and in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk*, 291 U. S. 431, in refusing to enjoin parties who have obtained decrees or

judgments in other courts from enforcing them in a manner inimical to the rights of parties not bound thereby.

Reasons Relied Upon for Allowance of Writs.

1. The United States Circuit Court of Appeals, Sixth Circuit, has decided an important question of Federal law, probably in conflict with the Fifth Amendment to the Constitution of the United States, and in conflict with the decision of this Court in *Hansberry* v. *Lee*, 311 U. S. 32.

2. The United States Circuit Court of Appeals, Sixth Circuit, has decided important questions of local law, probably in conflict with local statutes and decisions in the following respects:

(a) It has decided that Bloomfield Village Drain and Bloomfield No. 1 Storm Sewer Drain are illegal structures, in the absence of any violation of the Drain Law by the officers who designed and built them, and contrary to the interpretations of such law by the local court of last resort in *Kennedy* v. *Dingman*, 272 Mich. 24, and *Detroit Trust Co.* v. *Dingman*, 291 Mich. 170.

(b) It has decided that a municipality which issues its bonds, reciting therein that the same are issued for a purpose which the law authorizes, is not estopped against *bona fide* holders of said bonds to plead the falsity of its recitals, which decision is in conflict with local decisions as follows: *Common Council v. Schlich*, 81 Mich. 405; *Thompson* v. *Village of Mecosta*, 127 Mich. 522; *Schmid* v. *Village of Frankfort*, 131 Mich. 197; *Bates* v. *City of Hastings*, 145 Mich. 574, and *Baker, et al.* v. *Ruddiman #3 Drain District, et al.*, unreported decision of United States District Court, Western District of Michigan, Southern Division.

(c) It has decided that public officers charged with the duty of levying and collecting taxes, maintaining sinking funds for the payment of drain district bonds, and the

county charged with the duty of making temporary advancement of moneys in case of drain fund deficiencies, are not obliged to perform such duties when the validity of the bonds rests upon the estoppel of drain districts, its decision in this respect being without statutory warrant and contrary to general law.

(d) It has ignored and failed to give effect to Section 11, Chapter VI, of the Drain Law, Act 316 Public Acts of Michigan of 1923, as amended by Act 331 Public Acts of Michigan of 1927, Section 4902 Michigan Compiled Laws 1929 (see appendix, p. 8), the material part of which reads as follows: "If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity." It has failed to give effect to interpretations of this statute holding that collateral attack on the drain proceedings and taxes therefor is forbidden, contained in *Township of Clarence* v. *Dickinson,* 151 Mich. 270, and *Stellwagen* v. *Dingman,* 229 Mich. 159, and disregarded local decisions holding that judicial interpretations under which rights accrue must continue to be applied to such rights notwithstanding subsequent inconsistent decisions, *i. e. Pittsburgh, etc., Iron Co.* v. *L. S. Iron Co.*, 118 Mich. 109, and *Donohue* v. *Russell,* 264 Mich. 217.

(e) It has ignored and failed to give effect to Section 16, Chapter X, of the Drain Law, Act 316 Michigan Public Acts 1923, as amended by Act 331 Michigan Public Acts 1927, Section 4938 Michigan Compiled Laws 1929 (see appendix, p. 13), the material part of which reads as follows: "All of said installments (of drain taxes) and the interest thereon shall, as collected, be paid into the county treasury and there placed to the credit of the fund of said drain, to be used solely for the payment of bonds as the same shall

mature," and it has failed to give effect to Section 5, Chapter X, of said Drain Law, Act 316 Michigan Public Acts of 1923, Section 4927 Michigan Compiled Laws 1929 (see appendix, p. 10), the material portion of which reads as follows: "No suit shall be instituted to recover any drain tax or money paid or property sold therefor, or for damages on account thereof, unless brought within thirty (30) days from the time of payment of such money to, or sale of such property by, the collecting officer," and it has ignored and failed to give effect to the construction of said statute as contained in *Township of Norton* v. *Cockerill*, 265 Mich. 405; *Brooks* v. *Oakland County*, 268 Mich. 637.

3. The United States Court of Appeals, Sixth Circuit, has decided important questions as to powers of Federal courts to restrain action to enforce judgments of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in *Fetzer* v. *Johnson*, 15 Fed. (2) 145, and in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk*, 291 U. S. 431.

4. The Supreme Court of Michigan now has before it a case which we believe will determine the view of the State court as to whether bonds containing similar recitals to those here involved are valid in the hands of good faith holders. City of Highland Park and other holders of bonds of another drain district, Royal Oak No. 7 Storm Sewer Drain District, have petitioned the court to issue a writ of mandamus to compel the Drain Commissioner of Oakland County, Michigan, and the Board of Supervisors of such county, to levy and spread drain taxes for such drain. *City of Highland Park, et al.* v. *Clark, et al.*, No. 41,690, Michigan Supreme Court. Respondents have pleaded that they should not be compelled to do so because, as they allege, the project is a sewer and was so held to be in *Village of Oak Park* v.

Van Wagoner, 271 Mich. 450. Thus the same issue as was considered by the Circuit Court of Appeals will in all probability be decided within a few months, and will definitely determine the local law on the subject. Petitioners, therefore, believe that if this Court has any hesitancy to issue the writs of certiorari in this case, it should defer action until the State court of last resort has decided the pending action.

WHEREFORE, petitioners pray that writs of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, as provided by the statutes of the United States, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket, "No. 8560, Bloomfield Village Drain District, et al., Appellants, *v.* Kenneth M. Keefe, et al., Appellees," and "No. 8561, Oakland Hills Country Club, Appellant, *v.* Kenneth M. Keefe, et al., Appellees," and that the decrees therein of said Court of Appeals be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to the Court may seem just and proper.

Dated July 19, 1941.

KENNETH M. KEEFE, ERNEST E. QUANTRELL
and PELHAM C. WILMERDING,
Petitioners,

By DAVID M. WOOD, and
48 Wall St., New York, N. Y.,
Business Address,

RAYMOND J. DYKEMA,
2746 Penobscot Bldg., Detroit, Mich.,
Business Address,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

Opinions of the Courts Below.

Opinions of the District Court consist of the Report of the Special Master in Chancery (69); opinion of the District Judge (131); opinion of the Circuit Court of Appeals, Sixth Circuit (450), reported 119 Fed. (2) 157. No opinion was filed upon denial of petition for rehearing (505).

II.

Jurisdiction.

1. The date of the decrees to be reviewed is March 14, 1941 (449); rehearing denied May 9, 1941 (505).

2. This suit was brought to enforce rights of petitioners, and others of a class represented by them, as holders of bonds issued by the two drain districts described in the foregoing petition. The District Court had jurisdiction by virtue of diversity of citizenship. Judicial Code, Sec. 24, U. S. C., Title 28, Sec. 41.

The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 240 of the Judicial Code, U. S. C., Title 28, Sec. 347.

3. The cases believed to sustain jurisdiction are as follows:

Wuchter v. *Pizzutti*, 276 U. S. 13;
Western & A. R. R. v. *Henderson*, 279 U. S. 639;
Hansberry v. *Lee*, 311 U. S. 32;
Southern Railway Co. v. *Walters*, 284 U. S. 190;
Stringfellow v. *Atlantic Coast Line R. R. Co.*, 290 U. S. 322;

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179;
Chase National Bank v. *City of Norwalk*, 291 U. S. 431.

III.

Statement of the Case.

We deem the recital of facts contained in the "Summary Statement of Matters Involved" in the accompanying petition for writs of certiorari, together with the facts recited in the Master's report (84 *et seq.*), a sufficient statement to serve this Court in its consideration of this brief. Same are hereby adopted and made a part of this brief.

IV.

Specification of Errors.

The errors in the decision of the Circuit Court of Appeals which are relied upon by petitioners in this case are set out in the statement of "Reasons Relied upon for the Allowance of Writs" in the accompanying petition for writs of certiorari (10 *supra*). Petitioners will rely upon and urge before this Court all errors therein assigned. Same are hereby adopted and made a part of this brief.

V.

ARGUMENT.

Summary and Introductory Matters.

Since this is a class suit, we will refer to petitioners, and others in the class represented by them, as bondholders. We follow the grouping of questions involved, and reasons relied upon for allowance of writ of certiorari, but condense them to the following points:

1. Due process is denied petitioners by holding them barred from all remedies on their bonds by decrees in taxpayers' suits.

2. Lower court did not decide issues in accordance with local law.

(a) It rejected local interpretations of the drain statute in relation to the kind and character of drains which a drain commissioner is authorized to build.

(b) It rejected local authorities as to the effect of bond recitals.

(c) It held duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed.

(d) It ignored the effect of statutes prohibiting collateral attack on the drain proceedings.

(e) It ignored the effect of local statutes and general law, in failing to award bondholders money in the bond redemption funds.

3. Lower court held it could not restrain use of taxpayers' decree to impede collection of taxes.

Recognizing that this Court must be convinced of the importance of the questions to be decided, as well as the lower court's error in deciding them, we shall discuss under each main point reasons which we think justify this Court in taking jurisdiction.

1. Denial of due process by holding bondholders barred from all remedies on their bonds by decrees in taxpayers' suits.

Courts, as well as other governmental agencies, must observe rules designed to afford due process, and this Court has no higher or more important duty to perform than that of enforcing the Fifth and Fourteenth Amendments. It has done so frequently where comparatively small amounts are involved. In this case a large amount is involved, and the decision will directly affect a large number of persons.

Courts seldom deliberately disregard the obligation to afford due process. When they do so it is the result of errors in reasoning on some other matter. A frequent cause of this error lies in erroneous application of settled rules as to *res judicata*. Recently this Court was called upon, in *Hansberry* v. *Lee*, 311 U. S. 32, to reverse a State court because of its erroneous application of such rules. This Court there said:

> "But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process, it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

Undoubtedly the same statement would apply when judgments of lower Federal courts are considered in connection with the Fifth Amendment. There is also considerable similarity between the *Hansberry* case and this in regard to the issues involved. There it was claimed that a former judgment was binding upon a litigant on the theory of representation by one of a class; here it is claimed on the theory of representation by a public officer.

We anticipate that respondents will say that this question need not be considered because the lower court might have reached the same conclusion without holding that the former decree was a binding adjudication, but we think such argument untenable in view of the language of the lower court's opinion. The principal question which the lower court declared was presented (R. 456) included the fact of the decree of the court in the other case. The main portion of the decree is set out (R. 458). Lastly, it expressly says (R. 462), "Those cases are *res judicata* as to the determi-

native facts of this controversy." The argument thus presented in the lower court's opinion shows that the factor pertaining to the effect of the taxpayers' decree is so interwoven in the court's reasoning as to prevent the assumption that the court would have reached the same conclusion without it. See *State Tax Commission* v. *Van Cott*, 306 U. S. 511; *State of Minnesota* v. *National Tea Co.*, 309 U. S. 551. The principle is also well established that where an opinion gives two grounds for a conclusion, neither can be treated as obiter and disregarded by inferior courts. *Florida R. R. Co.* v. *Shutte*, 103 U. S. 118; *Union Pacific R. R. Co.* v. *Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160. Unless this decision is reversed, it will require all district courts in the Sixth Circuit to hold that decrees in taxpayers' suits against the validity of proceedings under which bonds are issued are binding adjudications against bondholders, even though they are strangers to the case in which the decree is rendered. We assume that this court, in the exercise of its supervisory jurisdiction, would prefer to correct the error now, if it is an error, before it becomes a rule of decision for courts in this circuit.

While the lower court says that petitioners are bound by decrees in *Meyering Land Co.* v. *Spencer*, 273 Mich. 703, and *Detroit Fire & Marine Insurance Co.* v. *Oakland County*, 284 Mich. 130, only the former is in the record (54) and the court did not have before it the pleadings in either case. From the one decree in the record and the opinions of the Michigan Supreme Court, it is plain that these were ordinary taxpayers' suits to relieve specific lands from tax liens. Relief was not prayed against bondholders, and no bondholders were named as parties or served with process. Certain of them knew that such suits were pending, but under all existing laws the decrees rendered therein could not affect their rights, except as opinions of the court might establish adverse precedents (80, 81, 93). They were pro-

ceeding in their own suit in the District Court for the protection of their own interests, and could see no obligation to dismiss their suit and ask leave to intervene in the taxpayers' suits. They believed that they could expect Federal courts of the Sixth Circuit to abide by the rule announced by this Court in reversing the same Circuit Court of Appeals, which says: (*Chase National Bank* v. *City of Norwalk*, 291 U. S. 431 (441)

> "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. * * * Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."

While the District Court regarded this pronouncement as binding upon it, apparently the Court of Appeals disagrees with it, for in the course of its opinion (463) it indicated that petitioners should have intervened in the suits which resulted in the decrees. The Court of Appeals also says that bondholders participated in the Meyering suit, but the only evidence in the record (365) concerning any connection between bondholders and the suit was the fact that one of the firms of attorneys representing petitioners was requested by the attorney representing Oakland County to assist him in the preparation of a brief, and that they gave him such assistance. Naturally such brief had to be based upon the record in the case and present arguments in favor of parties to the record. Bondholders took no part in the case in the Oakland County Circuit Court, and none of the parties to the case regarded them as parties to it. Under such circumstances, they are not bound by the decree. *Waltz* v. *Reliance Insurance Co.*, 221 Mich. 345; *Stryker* v. *Goodnow*, 123 U. S. 527, 540; *Pendleton* v. *Russell*, 144 U. S. 640.

The effect of the lower court's decision is to effectually prevent resort to the Federal Courts by a qualified party. If he cannot proceed in his own behalf in the Federal courts, without fear that in the meantime some judgment may be rendered by another court to which he is a stranger, which the Federal court will treat as *res judicata* under peculiar rules of its own, he must pursue all his remedies in the State court.

The Court of Appeals' reasoning that the decree obtained by taxpayers was an adjudication against bondholders is difficult to account for on any known principle of law. Such decree, the material part of which is quoted in the opinion, amounts only to a declaration that taxes against certain lands are invalid. It neither adjudicates the invalidity of taxes against other lands and municipalities, nor the invalidity of bonds. The lower court ignores the principle which it formerly recognized in *Royal Oak Drain District* v. *Keefe*, 87 F. (2d) 786, that under the law of Michigan courts are without jurisdiction in suits *in personam* to make decrees binding upon strangers (*Kinner* v. *Spencer*, 257 Mich. 142; *Welch* v. *City of Lincoln Park*, 268 Mich. 440), and that no decree or judgment can be *res judicata* in another suit unless there be identity of issues and parties. *Leroy* v. *Collins*, 165 Mich. 380; *Jacobson* v. *Miller*, 41 Mich. 90. As we understand its views, they rest upon (1) Sec. 14, Ch. 10, Act 316, Michigan Public Acts 1923, providing that in any suit brought to set aside any drain tax or in any way attacking the legality of any drain proceedings, the drain commissioner shall be joined as a party; (2) *Godkin* v. *Rutterbush*, 147 Mich. 116, a decision which ordered a suit dismissed where a taxpayer sought to recover a tax paid under protest, but neglected to join the drain commissioner, in which decision the court expressed its opinion that the legislature passed the statute because the commissioner in a peculiar sense stands as the representa-

tive of those who are interested in the drain and in the collection of the tax; and (3) *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485.

The first two grounds appear untenable under Michigan law, for as noted above, *Kinner* v. *Spencer* (*supra*), unqualifiedly denied the power of the court to grant any relief against bondholders, though it set aside taxes levied for a drain in a suit to which the drain commissioner was a party. The bill there prayed for an injunction against payment of the bonds, but the court refused such relief, saying: "None of the holders of such bonds were made parties to the suit." If the novel interpretation now placed by the lower court on this statute had appealed to the Michigan court, it is reasonable to suppose that it would have granted such relief. We submit, however, that the Court of Appeals virtually assumed legislative powers over the State of Michigan by placing an interpretation upon the statute which would make it confer a representative capacity upon the drain commissioner, and thus make any decree against him operate as a decree against all bondholders. The statutory provision is clear and explicit and requires no interpretation and the court, in *Godkin* v. *Rutterbush* (*supra*), did not pretend to interpret it. Its explanation of reasons which it supposed prompted the legislature to pass the law cannot be considered an interpretation, for the case called for no enlargement of the express language of the legislature. In Michigan, as elsewhere, the courts follow the rules set forth in *Detroit* v. *Township of Redford*, 253 Mich. 453,455; (1) if the wording of a statute is unambiguous there is no room for construction; (2) the terms of a statute cannot be extended by construction beyond the obvious import of its language.

If the statute had expressly provided what the lower court has read into it, it would be invalid (*Wuchter* v. *Pizzutti*, 276 U. S. 13) for one may not be made another's

statutory representative for any purposes of a law suit unless provision is made for notifying the absent party.

We submit that the lower court has been misled in its interpretation of *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485, and has extended it far beyond the intent of this Court. This Court there was reviewing a judgment of the Supreme Court of Arkansas and was, of course, bound by its interpretation of State law. It was attempting no independent interpretation of the State law and had no jurisdiction to do so. Its sole province was to determine whether the judgment of the State court violated Federal law. Here there is no decision of a Michigan court which ascribes such representative capacity as the lower court has given to the drain commissioner, but on the contrary, the fair inference is that the State court has expressly declined to bind bondholders on any theory of representation by the drain commissioner. *Kinner* v. *Spencer* (supra). In the *Kersh Lake* case there had been a prior adjudication of the same cause of action between identical parties in the State court, and the only question before the Supreme Court was whether the ordinary rules as to *res judicata* must yield, where it appeared that the party previously defeated was bringing the second suit in order to obtain funds to pay over to creditors. Here the opinion nullifies well established rules, which deny binding effect to a judgment between other parties on a different cause of action.

While the courts recognize that situations may occur where a party may stand in judgment for another, as in class suits, the rule of virtual representation is never applied unless it appears that the alleged representative necessarily and probably possessed the same interests as the absent party. The doctrine of virtual representation can never apply where their interests are adverse. *Hansberry* v. *Lee (supra)*. The interests of bondholders and the drain commissioner here were certainly adverse, for in the case

commenced by bondholders in the Federal Court the same commissioner whom the lower court supposed was the bondholders' representative pleaded and did his best to prove that bondholders had no rights.

2. Circuit Court of Appeals did not decide issues in accordance with local law.

We presume that all will agree with the statement in *New England Mutual Life Insurance Co.* v. *Mitchell*, 118 F. (2d) 414: "The respectful attitude toward the local court, where there has been no decision on the precise question before us, is to consider the question in the light of the common law of the state, with a view to reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it." The entire body of state law, both in statutes and court decisions, must be considered in the light of the customary rules of interpretation prevailing in the State. It is important that Federal courts adhere to this principle, otherwise they are giving merely lip service to the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

The principal legal issues considered in this section of our brief are all now before the Supreme Court of Michigan in a mandamus proceeding entitled "City of Highland Park, et al, *v.* Clark, et al," No. 41,690. In this suit relators seek to compel the levy and spread of taxes to pay bonds issued for the construction of a project considered in *Village of Oak Park* v. *Van Wagoner*, 271 Mich. 450, one of the Michigan authorities cited by the Circuit Court of Appeals. Respondents contend that they should not be compelled to take this action, advancing the same arguments used by the Court of Appeals in its decision. We believe that this fact should be called to this Court's atten-

tion, as it is likely that it would prefer to postpone action on the petition until the Michigan Court has decided the *City of Highland Park* case. This would accord with procedure in *American Surety Company* v. *Baldwin*, 287 U. S. 156, see note p. 163.

(a) Rejection by court of appeals of local interpretations of drain statute as to character of improvement drain commissioner was authorized to construct.

The Michigan statute relating to drains contains no restrictions as to the form they shall take; their location, depth, capacity, methods and materials of construction are within the commissioner's discretion. *Smith* v. *Carlow*, 114 Mich. 67; *Township of Swan Creek* v. *Brown*, 130 Mich. 382. The statute, as noted above, (appendix, p. 14) specifically authorizes their use for the removal of sewage, and the construction of sewage disposal plants as part of the drain project. The structures under consideration serve all drainage requirements, and contain no feature, appurtenance, or capacity for any contemplated sewage flow (281-285), but like any other channel or water course, sewage can be transported in them. On no reasonable basis can they be distinguished from the drains held legal in *Royal Oak Drain District* v. *Keefe*, 87 F. (2d) 786; *Kennedy* v. *Dingman*, 272 Mich. 24; and *Detroit Trust Co. v. Dingman*, 291 Mich. 170.

We submit that the lower Federal courts were in error in considering themselves bound by decisions of the Michigan Supreme Court in *Meyering Land Co.* v. *Spencer*, 273 Mich. 703, and *Detroit Fire & Marine Insurance Co.* v. *Oakland County*, 284 Mich. 130, which seem to proceed upon a theory of fraudulent conduct of the commissioner. The Federal courts should have considered only the evidence before them, which disclosed no fraud on the part of the

commissioner in conducting the proceedings, and demonstrated that he acted throughout as he was compelled to act, and within permissible discretion. Such reasons as are given in the *Meyering* and *Detroit Fire & Marine Company* cases are by this record and by *Detroit Trust Co.* v. *Dingman (supra)* demonstrated to be false and untenable, and to furnish no basis for an inference of illegality.

A decision holding a title, a patent, or any other act, thing or condition valid or invalid is valueless as a precedent merely because it involves the same subject matter, unless the reasons given are sound when considered in relation to other facts and circumstances presented. *Erie Railroad Co.* v. *Tompkins (supra)*, is by this opinion perverted from its true meaning, for it only applies where a settled rule of State law has been established. It cannot be said that it is the settled rule of Michigan law that these two drains shall always be held illegal, no matter what facts and arguments are presented. When a later decision of the State court declares principles adverse to such as may be gleaned from the decisions relating to these drains, it is the duty of the Federal Court to consider them as modifying those indirectly inferable from the former. It is not a sufficient answer to say that the later decision did not expressly overrule the former, or that it related to a different project. This Court, in deciding the *Erie Railroad Company* case, did not direct lower courts to surrender their duty of sound application of legal principles to every question before them in the light of the particular facts presented, and the whole body of statute and case law of the governing jurisdiction.

While there may have been some slight justification for the Master and District Judge holding these drains illegal under Michigan law (90), the Court of Appeals possessed an advantage over the District Court in regard to this question, for subsequent to the District Court's consideration of the case *Detroit Trust Co.* v. *Dingman (supra)* was

decided, and it should have given effect to that decision. (*Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 635, 61 S. Ct. 347.) In this decision the Michigan court did not merely decide that the structure there under consideration was a drain because of peculiar facts, it interpreted the statute. After quoting the provision authorizing the building of sewage disposal plants, it says that because of this provision, "it conclusively appears the legislature contemplated drains might be constructed for the purpose and with the intent that they should serve also as a means of disposing of ordinary sewage."

(b) Rejection by court of appeals of local authorities as to the effect of bond recitals.

An important question of public and commercial law is here involved. We think that the Court of Appeals has departed from a long line of decisions, particularly of this Court, and the courts of Michigan, in permitting these drain districts to gain an advantage by misrepresentations in their bonds. Hitherto the rule has always prevailed that a public corporation, like private corporations and individuals, is estopped from pleading its own wrong. It is a safe and salutary rule, beneficial both to investors and the public, for the certainty of its enforcement has in the long run enabled honest public corporations to borrow money for needed improvements, and to extend payment on their obligations, at low cost to their taxpayers. This decision, if followed, must ultimately drive investors to other forms of security involving less risk.

The rule which has long prevailed is accurately stated in Dillon on Municipal Corporations (5th Ed.), Art. 952, as follows:

> "The purchaser (of a municipal bond) is bound to see that there exists legislative power, that is a valid

> legislative act not in conflict with the state constitution for the issue of bonds, or commercial securities of the municipal, public or quasi corporation, and is bound to notice the contents and recitals in the instrument; but if such bonds are duly executed by the proper officers, and if these officers are by the true construction of the legislative enactment in that regard, invested with the power to decide whether conditions precedent have been performed, and the bonds contain a recital that such conditions have been complied with, or a recital which implies such compliance whether the preliminary conditions consist of facts *in pais* or facts of record—the issue of the bonds under such circumstances, with such a recital, is conclusive against the municipality (if the legislature has not otherwise provided) as to the fact or facts recited or implied in the recital, and estops it in an action by an innocent holder for value, before due, to show the contrary."

A vast amount of decisions in the Federal courts, and all States of the Union, support this rule. It is applied without limitation to cases of this kind—*i.e.*, where municipalities have by recitals in their bonds expressly or impliedly represented that they are issued for a lawful purpose, but after their issue attempt repudiation on the ground that their own representation was false and that the real purpose was unlawful. This precisely is the claim of the districts, their taxpayers and other defendants. They say that the bonds were not issued for a drain, as they represent on their face, but for sewers. To prove this they must point to facts either in the design for the projects, or in the motives of those who participated in the proceedings, and thus contradict their recitals of the due happening and performance of all required conditions precedent and full compliance with the law.

The opinion suggests that this recital is not of a fact, but of a condition of law, but we think that position is untenable. When one represents that he has complied with

the law and that there is no condition, thing, or event which would render his act illegal, he necessarily is representing facts, not law. The party to whom the representation is made is not interested in an interpretation of the law, but in assurance that everything has been done, and nothing omitted, from which a claim of non compliance could arise.

Recitals such as these in bonds *bona fide* held have uniformly been held to create an estoppel against pleading and proof of an actual unlawful purpose. McQuillan, Municipal Corporations, Vol. 6 (Revised), Art. 2497, 2502; 19 R. C. L. p. 1018, Art. 311; 44 C. J. p. 1253, Art. 425; 86 A. L. R. p. 1086. The leading case, *Hackett* v. *Ottawa*, 99 U. S. 86, is clearly reasoned and has never been disputed by the court of any jurisdiction. In Michigan the doctrine is announced in four decisions, never overruled or questioned. *Common Council* v. *Schlich*, 81 Mich. 405; *Thompson* v. *Village of Mecosta*, 127 Mich. 522; *Schmid* v. *Village of Frankfort*, 131 Mich. 197, and *Bates* v. *City of Hastings*, 145 Mich. 574.

In the *Schlich* case, the recital was compliance with a law authorizing bonds to provide funds for public improvements, but the real purpose was to grant aid to a railroad. In a summary of the arguments preceding the opinion, we see that the village contended for the same propositions asserted by the Court of Appeals, but the Michigan court overruled them, saying:

> "If defendant Schlich was a bona fide purchaser without notice of the real object for which these bonds were issued, the village is bound to pay them. This is the only question that can be involved in a suit brought to recover upon these bonds; for they would be void in the hands of those who knew the history of the transaction and the purpose for which they were issued."

The Court of Appeals made no reference to this decision.

In *Thompson* v. *Village of Mecosta* (*supra*), the bonds recited compliance with a similar statute, but actually they

were issued to induce an owner of a grist mill to locate it in the village. The Michigan court answered the contention of the village that the bonds were void no matter in whose hands, because emanating from an *ultra vires* act, saying:

> "Was the bond void in the hands of a bona fide holder? This bond purports to have been issued under authority of a law which it mentions, and for the purpose prescribed by the act—a thing that the Village might lawfully do. As a matter of fact it was not issued for such a purpose, but for a private improvement, and upon its face it unquestionably carried a false pretense; but a bona fide purchaser for value had a right to rely upon the statement of the board, appearing in the bond, that it was issued to borrow money under this act for lawful purpose, i. e., public improvements."

To show its complete adherence to the rule estopping the municipality to plead an unlawful purpose inconsistent with the recital, the court cites the leading authorities then in existence, among others the following: *Hackett* v. *Ottawa* (*supra*); *Risley* v. *Howell*, 64 Fed. 453; *Kent* v. *Dana*, 100 Fed. 56; *National Life Insurance Co.* v. *Board of Education*, 62 Fed. 778; *Coler* v. *Dwight School Twp.*, 3 N. Dak. 249; *Waite* v. *Santa Cruz*, 89 Fed. 619 (afterwards affirmed in 184 U. S. 302).

In *Schmid* v. *Village of Frankfort* (*supra*), under like circumstances the Michigan court, reversing a judgment for the village, said:

> "It is admitted that the bonds were illegal and void, because they were delivered to one Seeley in pursuance of a contract to aid a private enterprise, if they were delivered at all. At the same time they were valid upon their face, reciting that they were made and issued for a lawful purpose (p. 198). * * * Undoubtedly, if the purchasers had been aware of the resolution under which these bonds were issued, it would have been notice of their invalidity; but the evidence indicated that they

> had no such notice, and that they relied upon the recitals in the bonds, and an accompanying letter from the prosecuting attorney that the proceedings were, upon their face, valid, as to the vote of the electors to issue park bonds. We have held in several cases that one relying upon the recitals in a bond that it was lawfully issued may be a purchaser in good faith."

In *Bates* v. *City of Hastings* (*supra*), suit was instituted by a taxpayer to restrain the city from issuing bonds, alleging that its purpose was to use the proceeds to pay factory bonuses. The Michigan Supreme Court adopted a circuit judge's opinion, in which he said:

> "It may be presumed that the bonds which the bill alleges are about to be issued by the proper city authorities, will be valid on their face and may be disposed of to innocent purchasers. Such bonds in the hands of innocent holders, without notice, are collectible and the city must pay them" (citing the Schlich, Thompson and Schmid cases, supra).

The Court of Appeals also made no reference to this decision. It did, however, refer to the *Thompson* and *Schmid* cases, but said that they should be disregarded because "the villages themselves took part in a false recital, contrary to facts later sought to be asserted." With utmost respect to the Court of Appeals, we submit that this is an untenable distinction. It is novel because nowhere in the decisions does the Michigan court express this as a ground for its conclusion, and we think it wholly meaningless. The representation was that of the village itself, just as here the representation is that of the drain district. There is no way in which an artificial body can make any recital or representation, or do any other act except through agents. It is not a question of participation, but one of actual responsibility as principal for the act of authorized agents.

The Court of Appeals says that it is the law of Michigan that where the projects are illegal from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders. It cites no authority for this strange doctrine, for there is none. No Michigan decision has so held, and it is unreasonable to expect that any should, for it would be contrary to the decisions above quoted. In each of those cases the projects were as illegal as any that could be imagined. Neither the villages nor their officials were acting within any authority or jurisdiction in the project in which they were actually engaged. Public credit was being used in aid of private parties. Projects were being financed which not even the legislature could authorize as municipal enterprises, yet the court said that bona fide holding, plus the bond recitals, made the municipality liable.

While no case involving the effect of recitals in drain district bonds has been considered by the Michigan court of last resort, we believe it to be the duty of a Federal court, under *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, to ascertain from all available data what the State law is, and that it should consider any well reasoned opinion of a court exercising jurisdiction in the State which has been accepted by the bar and litigants. In the early part of the year 1939 Judge Fred M. Raymond, of the Western District of Michigan, in *Baker, et al.*, v. *Ruddiman No. 3 Valley Drain District, et al.*, had before him the precise question as here. The Ruddiman Valley No. 3 Drain District had built a drain and issued bonds therefor. Later the State court, in a taxpayers' suit (see *Norton* v. *Cockerill*, 265 Mich. 405) held the project to be a sewer and restrained the levy of taxes against some properties and a township. In an unreported opinion rendered

upon a motion of the drain district to set aside a default judgment, the court said:

> "This matter is before the court upon motion of Ruddiman Valley No. 3 Drain District to set aside its default entered about March 1, 1939, and the default judgment entered against it March 15, 1939. Assuming that defendant has made sufficient showing of excusable neglect in failure to appear and answer to entitle it to an order setting aside the default, there still remains the obstacle that it has not made showing of existence of competent evidence to establish a meritorious defense. See Koen *v.* Beardsley, 63 F. (2d) 595; William Lane, Inc. *v.* Selby Shoe Co., 45 F. (2d) 581; David A. Manville & Co. *v.* Francis Oil & Refining Co., 20 F. (2d) 473; Moore's Federal Practice, sec. 55.03.
>
> "By the answer which this defendant asks leave to file, it denies that plaintiffs have the right to institute this proceeding as a class action. It also avers that the County Drain Commissioner had no jurisdiction or authority in law to assess the lands embraced in the so-called drainage district, for the reason that the construction was not for a drain but for the purpose of a trunk line sanitary sewer.

(We here omit a paragraph dealing with a question as to the court's jurisdiction.)

> "The International Typographical Union is a bona fide purchaser of the bonds. Recitals in the bonds certify that they were issued to build a drain pursuant to applicable drain laws and that all acts, conditions and things required to be done precedent to their legality had happened and had been performed in due form and time as required by law. In view of these recitals and upon well established authority, the court is of opinion that this defendant cannot now be permitted to defend upon the ground of invalidity. See Royal Oak Drain Dist. Oakland County, Mich. *v.* Keefe, (C. C. A. 6), 87 F. (2d) 786; Hackett *v.* Ottawa, 99 U. S.

86; City of Defiance *v.* Schmidt, (C. C. A. 6), 123 F. 1; Thompson *v.* Village of Mecosta, 127 Mich. 522."

As the defeated party did not appeal and the judgment has been paid, which respondents can easily verify by an inspection of the records of the case, it may be regarded as evidence of State law. It is also evidence that jurists trained in Michigan law regard *Thompson* v. *Village of Mecosta* (*supra*) as a clear expression of Michigan law applicable to the plea of a drain district that it issued its bonds for something other than a drainage purpose.

There is no indication in any Michigan decisions that the Court of last resort disagrees with the general body of Federal law on the subject of bond recitals, or the rule condensed by Judge Dillon, which we have quoted. The rule necessarily implies that to be effective, the issuing officers must "by the true construction of the legislative enactment in that regard, be invested with power to decide whether the conditions precedent have been performed." The master and district judge properly construed the law as conferring implied authority on the drain commissioner. The report says (94) the authority will be implied,

> "where the official making the recitals is the one most logically in possession of the means of knowing whether the conditions as to authority to issue the bonds have been fulfilled. Bernard Twp. *v.* Morrison, 133 U. S. 523; City of Defiance *v.* Schmidt, 123 Fed. 1; Gibbs *v.* School District, 88 Mich. 334; Coler *v.* Dwight School District, 3 N. Dak. 249, 259. It does not appear from the opinions in Thompson *v.* Mecosta (supra) or Schmid *v.* Village of Frankfort, 131 Mich. 197, where the estoppel-by-recitals rule was applied, that there was specific statutory authority for the officials to make the recitals."

Spitzer v. *Village of Blanchard*, 82 Mich. 234, and *First Wisconsin National Bank* v. *Bessemer Twp.*, 286 Mich. 426,

cited by the Court of Appeals, are in harmony with the general rule, and if one refers to the authorities which the former decision incorporates, *Dixon County* v. *Field*, 111 U. S. 83, and *Bernard Twp.* v. *Morrison*, 133 U. S. 523, it is readily seen why they were decided against the bondholders. By the true construction of the legislative enactment, the officers who issued the bonds in those cases were not invested with power to decide whether the particular conditions precedent involved in those cases had been performed. In the *Village of Blanchard* case, the defect was the want of a proper election and excess of the debt limit. The issuing officers had nothing to do with the election, nor the determination of the assessed valuation to which the debt limit was related. In the *Township of Bessemer* case, authority was incomplete until the State treasurer had issued his certificate of full compliance. These drain bond issues were like the bond issues of the Villages of Mecosta, Frankfort, etc. The officials authorized to issue them were the only officers who could know their own purposes. *Chemical Bank & Trust Co.* v. *County of Oakland*, 264 Mich. 673, also cited by the Court of Appeals, supports petitioners' position, for there the recital was given effect even against the claim of an excess of debt limitation provision of the constitution. The only other Michigan case cited by the Court of Appeals on this subject, *Portsmouth Savings Bank* v. *Ashley*, 91 Mich. 670, bears no relation to the subject, for there the bonds were never delivered. Officers, without any authority from the village council, delivered them without consideration. Of course, there could be no rights founded upon an instrument which never was issued.

With the utmost deference to the Court of Appeals, petitioners complaint is that the court did not consider all the law of Michigan on the subject. By a superficial reading of some decisions, a selection of isolated passages therefrom, and application of unwarranted distinctions against

other decisions, it arrived at a conclusion wholly at variance with Michigan law.

(c) *Error of Court of Appeals in holding duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed.*

The Court of Appeals treats the obligation of officers and Oakland County, imposed by statute to provide for payment of the bonds, as worthless, unless the bonds from every standpoint are valid (457). If the enforceability of the bonds rests upon the ground of estoppel, the court holds that no one need recognize them or perform duties in connection with the raising and maintenance of funds for their payment. The court says that since the County and its various officers and boards which must levy and collect taxes did not sign the bonds, they could not be estopped and, therefore, no demand may be made against them for performance of their duties. This involves a strange distortion of legal reasoning.

If bonds are held enforceable against a municipality on the ground of estoppel an indebtedness is adjudicated, and its officials are then required to exert such taxing power as they have to provide funds for the payment of the debt. They are not concerned with the ground upon which the debt is adjudicated. If it were otherwise, there would be no practical benefit to a bondholder in obtaining a judgment upon bonds, where the only basis for such judgment is estoppel. His judgment would be a useless entry upon court records, if it did not afford him a basis for recovery of the amount adjudicated in his favor.

The County, under the amendment to the Drain Law Act, 331 Michigan Public Acts 1927, stands in the same relationship to the bonds as the assessing and collecting

officers. It is obliged to advance and pay them out of its general funds, provided that such advancement shall not cause the debt of the County to exceed the constitutional limitation thereof (Appendix 12). The Court of Appeals has put into the statute a limitation which the legislature did not see fit to include, by holding that this statute applies only to bonds issued to build a legal drain. We admit that the statute would not apply to invalid bonds, i. e. those which the drain district is not obliged to pay, but contend that any bond adjudged to be the debt of the district, no matter on what ground the judgment rests, calls for the performance of the County's statutory duty. As before noted, the rule in Michigan forbids judicial interpretations to restrict or enlarge unambiguous language of the legislature. The statute contains several conditions upon the right of the bondholder to call for payment, i. e. there must be money in the general fund, and the advancement must not cause the County to exceed its debt limit. It does not say in addition to these limitations that it must also appear that a legal drain was constructed with the bond proceeds. If the legislature had so intended it could have easily expressed this additional limitation. A federal court should not assume legislative powers.

(d) *Error of Court of Appeals in Ignoring Effect of Statute Prohibiting Collateral Attack on the Drain Proceedings.*

In arriving at its conclusion that the districts and the taxpayers could attack in a collateral suit the validity of the drain, the court entirely ignored local statutes and decisions, which if considered would require a decision that the court is obliged to hold these matters foreclosed by failure to follow the statutory remedy of certiorari. The provision of the statute making certiorari the exclusive remedy of those who wish to attack the proceeding (Ap-

pendix 8) says in unambiguous language that there shall be no collateral attack, *i. e.* "if no certiorari shall be brought within the time herein prescribed, the drain shall be deemed to have been legally established and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity." Probably the Court of Appeals felt that its view that the rights of bondholders had been barred by a prior adjudication made it unnecessary to consider this point, and naturally petitioners would be obliged to admit that if in some prior suit they had previously litigated their rights as bond holders, failure of the court to consider this point, or its erroneous view thereon, would not entitled them to relitigate. This only serves to emphasize what we have said on the first point in this brief, that the court's determination of the *res judicata* proposition is so essential to the decision that it cannot be regarded as an independent proposition.

This court has many times in the past sustained the validity of municipal bonds, where at the time of their issue judicial interpretations of empowering acts or the state constitution assured purchasers that they were obtaining valid obligations. It refused to adjudge the bonds void, where subsequent decisions placed adverse constructions upon the statute and the constitution. *Douglas* v. *Pike County,* 101 U. S. 677; *Taylor* v. *Ypsilanti,* 105 U. S. 60.

In the former case this court said:

> "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment."

Many states, as indicated in *Great Northern Railroad Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 364, follow

the same rule, and Michigan is one of them. *Pittsburgh etc. Iron Co.* v. *L. S. Iron Co.,* 118 Mich. 109, 127; *Donohue* v. *Russell,* 264 Mich. 217, 219.

In the latter case the court said:

> "The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision, except insofar as the construction last given would impair the obligations of contracts entered into or affect vested rights acquired in reliance on the earlier decisions.

It is true that in *Meyering Land Co.* v. *Spencer,* the court said that this certiorari provision did not bar the suit because the jurisdiction of the drain commissioner was attacked, but that decision was contrary to the interpretations of the section which prevailed when the bonds were issued. The statute, its interpretation, and the expiration of the period for bringing certiorari, were conditions upon which parties necessarily relied in the purchase of their bonds. The interpretations of this clause prior to the issuance of these bonds are clear.

In *Township of Clarence* v. *Dickinson,* 151 Mich. 270, plaintiffs in a collateral suit attacked the legality of a tax, and proved that while it was called a tax for the extension of a drain, it was really a tax for a new drain, and that the commission lacked jurisdiction because the application was not signed by the number of persons required to sign applications for a new drain. Plaintiffs urged that inasmuch as the petition was not signed by the necessary number of qualified persons, the drain commissioner had no jurisdiction and the proceedings were a nullity and could be attacked collaterally. The court overruled this contention, saying:

> "I have no doubt cases may arise to which this law can have no constitutional application. Such a case

will be presented if the proceedings before the drain commissioner violate constitutional rights. The fact that such cases may arise is no reason for declaring the law unconstitutional. It is to be presumed that the legislature intended to enact a constitutional law and not an unconstitutional law (Cooley on Constitutional Limitations, 7th Ed., p. 255), and it should be construed in accordance with this intent. The language of the statute indicates that the legislature intended to go to the limit of its authority, but it is also to be presumed that it did not intend to exceed those limits.

* * * * * * *

"Can the statute have constitutional application to this case? The only reason advanced for saying that it cannot, is this, viz., that equity can afford relief whenever the drain commissioner lacks jurisdiction. It is apparent from the foregoing reasoning that the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution. The objection to the jurisdiction in such cases must be a valid constitutional objection. Such objection could be urged if no notice or opportunity of hearing was given to one whose property was to be taken for the construction of the drain, for he has a constitutional right to such notice, and if that right is disregarded, the proceedings are as to him a nullity. If, on the other hand, the objections to the jurisdiction are not of a constitutional character, it is obvious that the legislature has a right to say how they shall be raised, or, in its wisdom, deprive one altogether of the privilege of raising them.

"The jurisdictional objection raised by complainant is not of a constitutional character. The Constitution does not require the petition to be signed by five property owners liable to assessments for benefits. That requirement is purely statutory. The legislature might have dispensed with it altogether. It therefore possessed ample constitutional authority to declare how objections to its non-observance should be made. It had

authority to declare that objections not so raised should be disregarded. It exercised that authority by the statute under consideration. That statute is therefore constitutional in its application to this case and it prevents complainants maintaining this suit."

This decision was reaffirmed in *Stellwagen* v. *Dingman*, 229 Mich. 159, where collateral attack was made upon drain proceedings and an injunction sought against the collection of a drain tax, because of a defective petition instituting the proceedings. The court said:

"In Township of Clarence *v.* Dickinson, 151 Mich. 270, wherein the objection was based on a claim that the requisite number of taxpayers liable to assessment for benefits had not signed the petition, it was held that 'the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution.' It was said that—

" 'Such objection could be urged if no notice or opportunity of hearing was given to one whose property was to be taken for the construction of the drain,'

but that there is no constitutional requirement as to the number who shall sign the petition; that the requirement was statutory; that the legislature might provide that objections should be raised in the manner provided by the statute (by certiorari), and that the denial of other remedy was not a violation of constitutional rights. This decision has been quoted from with approval in the more recent cases of Cummings *v.* Garner, 213 Mich. 408, and Heliker *v.* Oakland County, 216 Mich. 593, *and must be accepted as the settled law of this State*. That it is in line with the weight of authority will be seen by a perusal of the note on page 856 of 9 A. L. R." (Emphasis is ours.)

The *Stellwagen* case was decided in 1924, but a short time before these bonds were sold, and there had been no intervening decision. Therefore, as the law stood when these

bonds were issued, bondholders were assured that there could be no collateral attack unless through want of notice or fraudulent conduct in respect to hearings a taxpayer was deprived of a hearing. It could not be said that a taxpayer had a constitutional right not to have a sewer built and to be assessed therefor, because after it became known that taxpayers were asserting distinctions between drains and sewers the statute was amended to specifically authorize the building of sewers, and it was held that this amendment was within the constitutional power of the legislature. *Township of Warren* v. *Engelbrecht*, 251 Mich. 608; *Gray* v. *Dingman*, 279 Mich. 62.

We frankly concede that cases decided after the bonds were issued indicate that a different construction will now be given to the certiorari statute, and if Michigan followed the rule of giving all changes of interpretation retroactive effect, we could not urge this point. But as before noted, that rule is limited so as not to disturb rights which parties have acquired in reliance upon the earlier interpretation.

(e) *Error of Court of Appeals in Failing to Award Bondholders Money in the Bond Redemption Fund.*

The Court of Appeals further ignored local law in failing to pass upon the rights of bondholders to the fund subject to the direction of the district court derived from taxes voluntarily paid.

Assuming that the lower court correctly held on some proposition that the bonds are void, it was not justified in denying all relief to bondholders. We believe that it is well established law that where taxes are paid voluntarily by taxpayers to create a fund to pay bonds which have been issued, the collecting agency holds this fund in trust for bondholders (*Vickery* v. *Sioux City*, 104 Fed. 164; *Thompson* v. *Emmett Irrigation District*, 227 Fed. 560); also that as trustee it must distribute it in accordance with

the purpose under which it was paid, and that such agency cannot refuse to do this because the bonds represent a debt which the municipality could not create. *Willis* v. *Board of Commissioners*, 86 Fed. 872; *City of Akron* v. *Barber Asphalt Co.*, 171 Fed. 29.

The money paid by taxpayers is now in the possession of a bank, as custodian, under order of the District Court (163, 172), the lower court's mandate being stayed pending this application for writ of certiorari. The lower court, however, by denying all relief and ordering the bill dismissed, deprives bondholders of all interest in the fund.

Under Michigan law (see p. 13, appendix), this fund can only be used for the purpose of paying bonds. Those who paid the taxes to create it cannot have it refunded to them, as they failed to pay their taxes under protest and sue for the amount paid within thirty days. *Township of Norton* v. *Cockerill*, 265 Mich. 405; *Brooks* v. *Oakland County*, 268 Mich. 637. The effect of the lower court's decision is to turn this money over to Oakland County as a gift.

It is our contention that in any event this money should be paid to bondholders, as the bonds, even if invalid as obligations of the districts, can be treated as certificates of participation in the fund. *Chelsea Savings Bank* v. *Ironwood*, 130 Fed. 410.

3. Error of Circuit Court of Appeals in refusing to restrain use of taxpayers' decree to impede tax collections.

An important question which the Court of Appeals has apparently decided in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk*, 291 U. S. 431, and the Court of Appeals of the Eighth Circuit in *Fetzer* v. *Johnson*, 15 F. (2d) 145, relates to the power of a Federal court to restrain by its injunction parties before it from using decrees or judgments they have obtained in

courts of concurrent jurisdictions in a manner inimical to parties who properly seek relief before them. This court of appeals, by its decision in the *City of Norwalk* case, evidenced its extreme caution in enjoining parties from making use of a judgment of ouster from the streets of an Ohio city of a public utility corporation, where the mortgagee of the properties and franchises of the corporation had not been given its day in court. It still seems to adhere to the same theories which caused it to be reversed by this Court.

The district court, we think, properly decided that it had power to enter such personal decrees in favor of and against parties before it, as the rights of such parties required. We think that when a Federal court is called upon to administer equity, and has jurisdiction of the subject matter and parties, it has power to and should exercise its jurisdiction to the fullest extent to settle all matters in controversy and to afford complete relief, unless restrained by some express statutory or constitutional provision. There is no Federal statute which forbids a Federal court to restrain parties in a proper case from taking advantage of a judgment or decree of a court of concurrent jurisdiction. If the bonds are valid, bondholders are entitled to have taxes pledged to their payment, and such taxes as may subsequently be levied enforced. The court's jurisdiction does not cease with a mere judgment in favor of bondholders. It continues to afford such relief as may provide for payment. *Riggs* v. *Johnston County*, 6 Wall. 166; *U. S.* v. *Council of Keokuk*, 6 Wall. 514. We submit that if the bonds are valid on any ground, and if bondholders are not barred by prior adjudication, they are entitled to injunctions restraining taxpayers who are parties to the suit from impeding officials from levying and enforcing the taxes. Such injunctions are not issued against other courts, but against parties who threaten wrongful use of such judgments and decrees.

Conclusion.

The first and third propositions advanced in this brie being comparatively simple questions of Federal law an vitally affecting the rights of all citizens, ought, we think to be specifically decided by this Court. The second prop osition may only be considered of importance in this Cour in so far as it appears that the Court of Appeals departe from a proper course of action which a Federal cour should follow in administering State law. It is dis cussed in this brief because it is necessary to completel present bondholders' case. If the Court is reluctant t fully consider this proposition, we think a just decisio will finally be reached if the Court of Appeals is reverse on the first and third points, and the case remanded wit directions to fully consider all applicable local law relatin to the second point.

We again call the Court's attention to the fact that th same legal issues decided by the Court of Appeals are no before the Supreme Court of Michigan awaiting decision (See *ante*, page 12.)

We, therefore, submit that the accompanying petition fo a writ of certiorari ought to be granted.

DAVID M. WOOD,
Business Address:
48 Wall St., New York, N. Y.;
RAYMOND J. DYKEMA,
Counsel for Petitioners,
2746 Penobscot Bldg.,
Detroit, Mich.

APPENDIX.

Portions of the Michigan Drain Law Applicable to Case.

This appendix is intended to furnish a guide for the court to applicable portions of Michigan drain statutes. It omits chapters relating to inter-county drains and portions inapplicable to this and the three companion cases covered by the opinion of the Circuit Court of Appeals, directing entry of decrees which are sought to be reviewed. The codification of Michigan statutes relating to drains is Act 316, Public Acts of Michigan 1923. This was amended in some particulars by Acts 365 and 331 of the Michigan Public Acts of 1925 and 1927, respectively. At the beginning of each section we indicate the year in which the section was enacted. Unless otherwise indicated, the section remained in that form during succeeding years material to these cases.

Ch. I, Sec. 2 (1925) The word "drain" whenever used in this act shall be deemed to include any water course or ditch, opened or proposed to be opened, and improved for the purpose of drainage, and any artificial ditch or drain levee, dyke or barrier, or tile drain proposed or constructed for such purpose, structures and such mechanical devices as will properly purify the flow of such drains.

Ch. III, Sec. 1 (1923) Before a commissioner takes any action on any application to locate, establish and construct any drain, there shall first be filed with him an application to lay out and designate a drainage district with reference to a proposed drain therein; such application shall describe such proposed drain by its starting point, its general direction and terminus. The application shall be signed by not less than ten freeholders of the township or townships in which such proposed drain, or the proposed lands to be drained thereby, may be situated: Provided, That one-half of said signers shall be owners of land liable to an assessment for the construction of such proposed drain: Provided Further, If it shall appear upon filing an application to lay out and designate a drainage district that said district might not include ten freeholders whose lands would be

liable for such assessment, in such case such application shall be received if signed by any freeholders liable to an assessment for the construction of such proposed drain. The eligibility of the signers to such application shall be determined by their interest of record in the office of the register of deeds, in the probate court or in the circuit court of the county in which such lands are situated at the time such application is filed.

(A slight change in this section was made in 1927, not material to this case.)

Ch. III, Sec. 2 (1923) Upon receipt of such application for new drainage district, the commissioner shall immediately cause a survey of such proposed drain to be made by a competent surveyor or engineer: Provided, That if the application shows, or it shall be determined after the survey, that any such proposed drain will traverse more than one county or will affect lands liable for assessment for benefits in more than one county, said commissioner shall proceed under the portions of this chapter relating to inter-county drains. If upon such survey, or if before such survey is made, the commissioner shall determine that the proposed drain is impractical, he shall take no further action thereon but shall, in writing, notify the person or persons who delivered such application to him, of that fact, and his reasons for making such determination. If upon such survey the said commissioner shall determine such proposed drain to be practical, he shall lay out a drainage district, including therein all tracts or parcels of land, highways, townships and cities which would be benefited by the construction of such proposed drain, and which would be liable to an assessment therefor, should such drain be constructed as hereinafter provided.

Ch. III, Sec. 4 (1923) The commissioner shall thereupon prepare his order designating a drainage district so laid out and give it a name or number and describe therein the several tracts and parcels of land, highways, townships, and cities which would be benefited by the construction of such proposed drain and would be liable to assessment therefor. Also a description of the drain proposed in such application

showing its beginning, route, terminus, width, depth, yards of earth necessary to be removed in such proposed construction, and the estimated cost of such construction. The order designating such drainage districts, together with the application therefor, shall thereupon be filed in the office of the county drain commissioner of the county in which such drainage district is situated. The commissioner shall give notice of filing such order designating a drainage district by publishing a notice once in each week for two successive weeks in a newspaper, or newspapers, of general circulation in the county in which such district is situated, which notice shall give a general description of the route of the proposed drain as shown by the survey, and the names of the freeholders whose lands would be traversed thereby.

(A slight change in this section was made in 1927, not material to this case.)

Ch. IV, Sec. 1 (1923) After a drainage district has been established and the order therefor filed with the county drain commissioner, a petition to locate, establish and construct a drain may be filed with the commissioner having jurisdiction of the lands designated in such order as would be benefited by such construction. Such petition shall ask for the location, establishment and construction of a drain which will properly drain the lands described in such order. The petition shall be signed by a number of freeholders in said drainage district whose lands would be liable to an assessment for benefits equal to one-half of the number of freeholders whose lands would be traversed by said drain. The eligibility of the signers to such petition shall be determined by their interest of record in the office of the register of deeds, in the probate court or the circuit court of the county in which such lands are situated, at the time such petition is filed. Such petitioners shall be jointly and severally liable for all costs and expenses for the filing of such petition in case the proceeding shall be dismissed. If the persons signing such petition shall refuse to pay such costs and expenses, the commissioner shall bring suit in a court of competent jurisdiction and collect such costs and expenses. If the financial responsibility of petitioners shall

upon the filing, or thereafter, be determined insufficient, additional signatures may be required or such security furnished as will be approved by the commissioner.

Ch. IV, Sec. 2 (1923) Upon the filing of such petition, the commissioner authorized to act thereon shall as soon as practicable thereafter serve upon the judge of probate of the county a copy of said petition. Within fifteen days after the service of said notice upon him it shall be the duty of the judge of probate so notified to appoint a board of determination, to call a meeting thereof at some place to be designated by said judge and which shall be as centrally located as possible within the drainage district, giving notice of the time and place of such meeting, and the said judge shall cause a copy of such notice to be published for not less than one week in a newspaper published and in general circulation in the county. The said board of determination shall be composed of three members each of whom shall be the supervisor of a township within such county into which the drainage district does not extend. At the time and place fixed in said notice said board shall meet, elect a secretary and proceed to determine the necessity of said proposed drain and whether the same is necessary and conducive to public health, convenience and welfare. At such meeting all persons owning lands liable to assessment for benefits, or whose land shall be crossed by said drain, or any district or municipality affected, may appear for or against said drain proceeding. After hearing the evidence so offered as herein provided, the board shall make their determination upon the necessity of such drain and whether the same is necessary and conducive to public health, convenience and welfare.

If the said board shall find by a majority vote of the whole number of members present and voting thereon that the said drain is not necessary or conducive to public health, convenience or welfare, they shall file with the Commissioner an order dismissing the petition and no further petition for said drain shall be entertained within one year after such determination. If said board by a majority vote, as aforesaid, shall find the said drain so proposed to be necessary and conducive to the public health, convenience

and welfare, they shall make their order to that effect and file the same with the said commissioner.

Upon the receipt of the order of said board, the commissioner shall make his first order of determination in writing, giving the name or number of the drainage district, and shall establish the commencement, route, and terminus of said drain and the width, depth and length thereof, a copy of which order he shall within five days file in his office.

(A slight change in this section, relating to the number of persons who should constitute the board of determination, was made in 1927. The balance of the chapter relates to procedure to obtain right-of-way.)

Ch. VI, Sec. 1 (1925) Upon the release of the right of way and damages, or upon the determination and return of the special commissioners, the commissioner shall make his final order of determination establishing the drain, which drain shall be divided into convenient sections for the letting of contracts. A certified copy of said order of determination shall be filed with the county drain commissioner within five days after such order is made. He shall before the day of letting and review apportion the per cent of the cost of construction of such drain which any township or city traversed or benefited thereby shall be liable to pay by reason of the benefit to the public health, convenience or welfare, or as the means of improving any highway under the control of such township or city. He shall apportion the per cent of the cost of construction of such drain which any highway then under the control of the state, county or township highway commissioners shall be liable to pay by reason of benefits therefor, and he shall also apportion the per cent of benefits to accrue to any piece or parcel of land by reason of the construction of such drain and above the per cent apportioned to any township or city at large or to any highway, as above provided. Such per cent so apportioned when finally approved shall be assessed against such township, cities, highways and lands according to such apportionment of benefits as hereinafter provided. The apportionment of benefits so made shall be subject to review and correction and may be appealed from as in this chapter provided. The board of

supervisors at its October meeting of each year shall make provision by proper assessment of the amounts apportioned against any highway under control of district highway commissioners and any highway under control of county highway commissioners.

(A slight change was made in this section in 1927 in relation to assessments against municipalities.)

Ch. VI, Sec. 4 (1925) The commissioner shall give notice for the holding of a public meeting, at which a review will be had of the apportionment of benefits made as aforesaid and also for the purpose of letting a contract or contracts for the construction of such drain. Notice of such hearing shall be given by publishing a notice thereof, at least two insertions in some newspaper published and of general circulation in the county, if there is one. Such notice shall be so published at least once not less than ten days prior to the hearing. The commissioner shall also give notice of such hearing by posting notices thereof in five conspicuous and public places in each township where the district is located, within the limits of said districts at least ten days prior to such hearing: Provided, That in all cases where the apportionment of benefits shows less than one hundred descriptions upon which benefits have been apportioned, personal service shall be had upon all resident land owners within the drainage district, at least ten days prior to such hearing. As to all other land owners, notice shall be given by posting and publication as above provided. Such notice shall also be personally served upon the supervisor of each township affected, the mayor of each city and upon the chairman of the highway commissioners having charge of any highway apportioned a per cent of the cost of such construction. Such notice shall contain the names of all cities, townships or highways affected. Such notice shall contain a description of the several tracts or parcels of land constituting the special assessment district of such drain: Provided, That it shall not be necessary to subdivide any tract or parcel beyond the point where the whole thereof is within such drainage district or to describe the said drain further than by reference to it by its name or number, and it shall also state the number and length of

sections; the average depth and width of each section; and in case of tile drains, the amount and specifications of all tile required; the location, number, type and size of all culverts and bridges and the conditions upon which the said contract or contracts will be awarded; and in no case shall said notice contain the minutes of survey or table of cuttings which shall be kept on file in the office of the drain commissioner and be open to inspection at the time and place of such letting, and that at the time and place of such letting, or at such other time and place thereafter to which the county drain commissioner may adjourn the same, the apportionment of benefits and the lands comprised within the special assessment district shall be subject to review for at least one day; such review shall be held open from nine o'clock in the forenoon until five o'clock in the afternoon. On such reviews the supervisor or commissioner of highways of any township may appear on behalf of such township. The mayor or some officer of the city designated by him may appear for such city, and any district or county road commissioner may appear on behalf of such district or county. At such review the county drain commissioner shall hear the proofs and allegations of all parties interested, and shall carefully reconsider and review the description of land comprised within the special assessment district, the several descriptions and appointment of benefits, and define and equalize the same as may seem just and equitable. Whenever an apportionment of benefits shall be made against a state trunk line highway, the drain commissioner shall at least twenty days before the review thereon notify by registered mail the state highway commissioner of the percentage apportioned against such highway and the date and place fixed for the review of all apportionment of benefits. If the state highway commissioner desires to have such apportionment of benefits reviewed by the state commissioner of agriculture, he shall within ten days from the receipt of such notice, file with the drain commissioner an objection to the apportionment. The drain commissioner shall then notify the state commissioner of agriculture of the day and place fixed for such review of apportionments and at such meeting the commissioner of agriculture or some deputy selected by him, shall review the apportion-

ment made against the said state trunk line highway, listen to the proofs and allegations of the parties and may view the highway benefited, and his action and decision, thereon, reduced to writing shall be final.

(Slight changes made in this section in 1927, relating to service and publication of notice.)

Ch. VI, Sec. 11 (1923) The proceedings in establishing any drain shall be subject to review upon certiorari, as herein provided. Notice of such certiorari shall be served upon the commissioner within ten days after the copy of the final order of determination of such commissioner in establishing any drain has been filed in his office as provided in section one of chapter six in the same manner as notice is required to be given of certiorari for reviewing judgments rendered by justices of the peace, and the writ shall be issued and served, and bond given and approved and the subject matter brought to issue in the same time and manner, as near as may be, as in such cases provided, except that such certiorari may be heard by the court during term, or at chambers, upon five days' notice given to the opposite party; and the circuit court of the county shall hear and determine the same without unnecessary delay, and if any material defect be found in the proceedings for establishing the drain, such proceedings shall be set aside. If the proceedings be sustained, the party bringing the certiorari shall be liable for the costs thereof, and if they be not sustained, the parties making application for the drain shall be liable for the costs. If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and its legality shall not thereafter be questioned in any suit at law or equity: Provided, No court shall allow any certiorari questioning the legality of any drain by any person unless notice has been given to the commissioner in accordance with the provisions of this chapter: Provided further, That when such proceedings are brought, the commissioner shall postpone the letting of contracts and all other proceedings until after the determination of the court. And if any error be found in the proceedings, the court shall direct the commissioner

to correct such error or errors and then proceed the same as though no error had been made.

(Slight changes made in this section in 1927, relating to procedure where errors occur after the final order of determination.)

Ch. IX, Sec. 3 (1923) Whenever the amount assessed for the construction of any drain shall not be sufficient to complete the same, and to pay all the costs and incidental expenses or to pay the principal and interest on bonds if such are issued, a further assessment shall be made to meet the deficit or additional expense. Such further assessment shall be apportioned, assessed, levied and collected as provided in the first instance, and on the same percentage, and shall be collected in one year, but there shall be no review of nor appeal from such further assessment.

Ch. X, Sec. 1 (1923) Within ten days after the letting of contracts, or in case of an appeal, then forthwith after such appeal shall have been decided, the commissioner shall make a computation of the entire cost of such drain which shall include (1) all the expense of laying out and designating the drainage district, which item of expense shall include the entire cost of the survey; (2) the expense of locating, establishing and constructing the drain; (3) the fees and expenses of special commissioners; (4) the compensation to be paid the board of review; (5) the cost of construction of bridges and culverts; (6) the contracts for the construction of the drain, or other work to be done on said drain; (7) the estimated cost of an appeal in case the apportionment made by the commissioner shall not be sustained; (8) the expenses of the state commissioner of agriculture, where called; (9) the cost of publishing all notices required; (10) and all fees of the probate judge, and he shall add the whole into a gross sum and add thereto five per cent of said gross sum to cover contingent expenses and the entire sum so ascertained shall be deemed to be the cost of construction of such drain.

Ch. X, Sec. 2 (1923) The Commissioner shall thereupon make a special assessment roll for such drain for each township, city or highway affected thereby, which roll shall be

designated "(giving the name) drain special assessment roll," and he shall enter therein a correct description of the tracts, parcels or subdivisions of land benefited by such drain and place opposite each description the amount of the per cent heretofore determined upon by him or by the board of review, as the case may be. He shall also enter thereon the amount of the per cent apportioned to such township, city or highway, and in case such amount be payable in installments, he shall also enter thereon a memorandum of the installments thereof and of the year or years when such installments shall be spread; and shall add a certificate in writing of the determination whether the taxes assessed for benefits shall be paid in one or more years. Such rolls shall be dated and signed by said commissioner and filed on or before the last Wednesday in September in each year, in the office of the county clerk.

(Slight changes in procedure were made in a 1927 amendment to this section.)

Ch. X, Sec. 5 (1923) All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. Drain taxes, when collected, shall be returned to the county treasurer to be disbursed by him. In all cases where suit is brought against the collector arising out of the collection of any drain tax, the county shall defend such officer in the same manner that he has now the right to be defended in the collection of general taxes. No suit shall be instituted to recover any drain tax or money paid or property sold therefor, or for damages on account thereof, unless brought within thirty days from the time of payment of such money to, or sale of such property by, the collecting officer; and if such tax shall be paid under protest the reasons therefor shall be specified, and the same procedure observed as is or may be required by the general tax law. All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon

the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid.

Ch. X, Sec. 6 (1923) If the taxes levied for the construction, cleaning out, widening, deepening, straightening, or extending of any drain are not collected by the township or city treasurer, they shall by him be returned, together with the lands upon which they were levied, to the county treasurer in the same return, at the same time, and in the same manner, in every respect (naming in each case the particular drain), as lands are returned for state, county and township taxes, and such taxes shall follow such lands, the same as all such other taxes, and all the general provisions of law now existing, or that may be hereafter enacted for enforcing the payment of township, county and state taxes, shall apply to such drain taxes, and to the lands returned delinquent therefor, in the same manner and with like effect.

Ch. X, Sec. 14 (1923) In any suit brought to set aside any drain tax, or in any way attacking the legality of any drain proceedings, the commissioner shall be made a party to said suit.

Ch. X, Sec. 15 (1925) In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than three installments, said commissioner may borrow money in anticipation of the collection of all installments after the first and may issue as evidence thereof the bonds of the drainage district as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied exclusive of the first installment. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable at such time or times, not exceeding ten years from the date thereof, as may be determined upon by the commissioner or as may be required by the date of maturity of the installments levied, it being the intent hereof that the dates of maturity of obligations issued hereunder shall be as nearly identical as is practicable with the collection of

the installment of drain taxes. (Provided that in cases where the estimated cost of any drain exceeds ten dollars per running foot, the drain commissioner may in his discretion determine that bonds issued hereunder may be made payable in not to exceed fifteen years from the date thereof). The commissioner shall prescribe the form of the bond and shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities and highways assessed at large, in the proportion that they are taxed for the benefits received thereby. In no case shall such bonds be sold for less than par and accrued interest. If any premium is received thereon such premium shall belong to the fund of the drain. The commissioner may make payment or partial payment of the cost of the drain in such bonds, or may sell part or all thereof, depositing the proceeds in the county treasury to the credit of the drain fund, to be disbursed as herein provided. The county treasurer shall safely keep all such bonds until sold as above provided.

Ch. X, Sec. 15 (1927) In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than one installment, said commissioner by and with the written approval of the judge of probate and the county treasurer of the county, may borrow money in anticipation of the collection of such installments and may issue as evidence thereof the bonds of the drainage districts as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable in annual installments equal in number to the installments of taxes, shall mature not earlier than March first nor later than June first of the year following the due dates of the respective installments of taxes. The number of installments shall not exceed fifteen and the amount of each installment shall be fixed by the commissioner to correspond as near as may be to his estimate of the amount of taxes actually collectible each year. The commissioner

shall prescribe the form of the bond by and with the written approval of the judge of probate and the county treasurer of the county shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby: Provided, That the written consent as above set forth of any judge of probate or county treasurer shall not be required in proceedings relating to inter-county drains. Such bonds shall be advertised and sold by the drain commissioner after the manner provided for the advertisement and sale of municipal bonds by act number two hundred seventy-three of the laws of nineteen hundred twenty-five and any amendments which may be made thereto governing such advertisement and sale. If any premium is received thereon such premium shall belong to the fund of the drain. The proceeds derived from the sale of such bonds shall be deposited with the county treasurer to the credit of the drain fund. The county treasurer shall safely keep all such bonds until sold as above provided. In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore or hereafter issued when they become due the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the county shall not cause the total debt of the county to exceed the constitutional limitation thereof.

Ch. X, Sec. 16 (1923) In cases where bonds are issued and sold by the commissioner all installments of the drain taxes subsequent to the first installment shall bear interest at the rate of six per cent per annum from the date of the preparation of the assessment roll until due. Such bonds may provide, if the commissioner so determines, for the payment of interest semi-annually. All of said subsequent installments and the interest thereon shall, as collected, be paid into the county treasury and there placed to the credit of the fund of the drain to be used solely for the payment of bonds as the same shall mature. All moneys thus collected in anticipation of the maturity of the bonds shall be depos-

ited by the county treasurer in a bank or banks to be designated by the board of supervisors of such county and the interest received shall belong to the fund: Provided, however, That any bank receiving county drain funds hereunder shall give bond to the county treasurer in an amount not less than the sum so deposited.

Ch. X, Sec. 18 (1923) If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay the same with interest, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasury and be used for the maintenance of the drain.

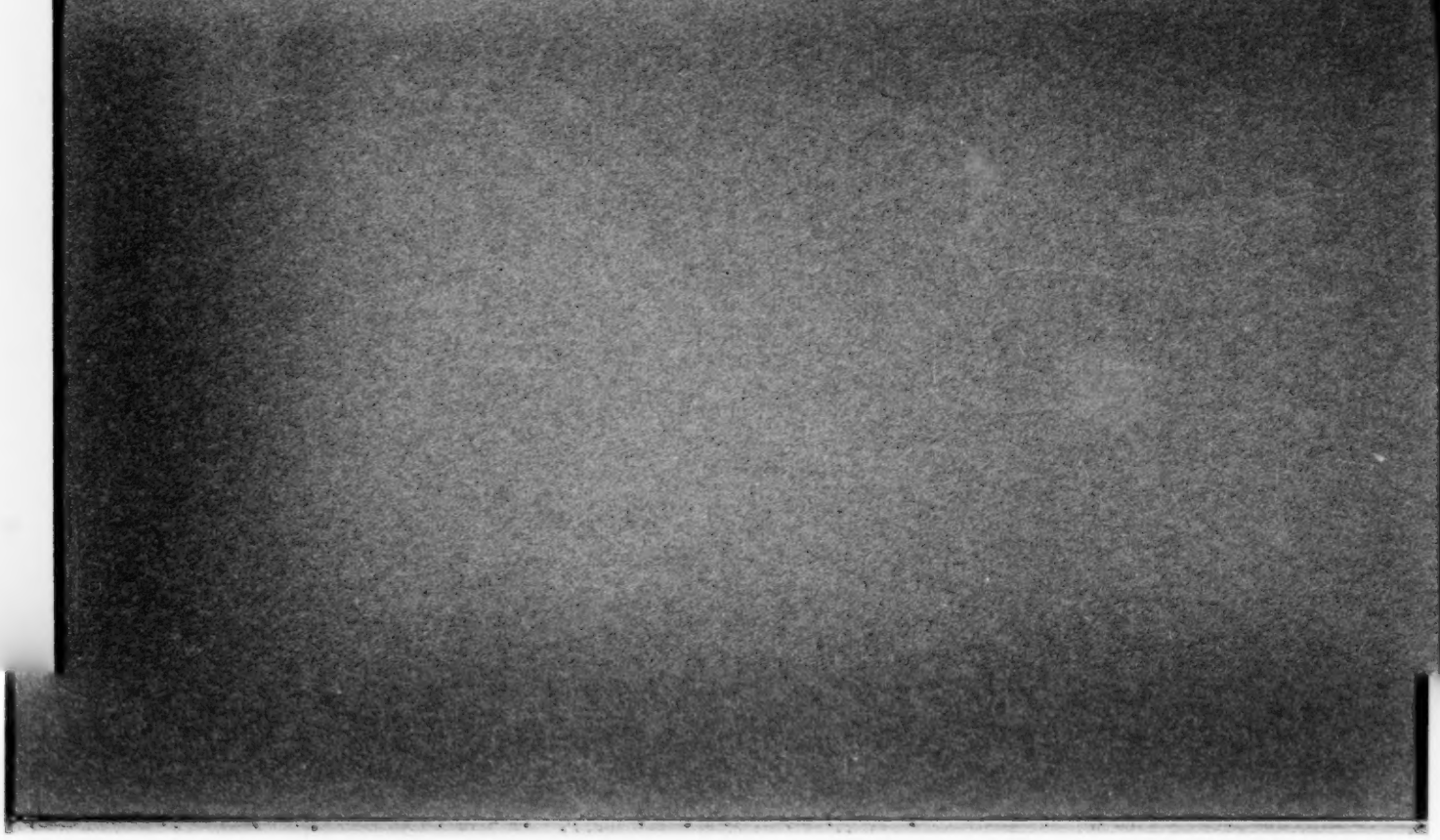
Ch. XVII, Sec. 5 (1925) Any county drain may be used for sewage disposal by any city, village or township for which it shall be available, but shall be kept cleaned out or enlarged as the county drain commissioner may determine to be necessary for the carrying off of the sewage and the natural flow of said drain at the expense of the city, village or township using the same, and if used by more than one, the expense to be borne by each shall be determined by the board of supervisors. Disposal plants, filtration beds and other mechanical devices as will properly purify the flow of any drain may be constructed and become a part of any established drain, the cost of construction therefor to be paid for in the same manner as other drainage costs as in this act provided. Such plants, beds, or devices may be described in the petition for the location, establishment and construction of drains or in the petition for the cleaning, widening, deepening, straightening or extending of drains, or in the application for the laying out of a drainage district. Petitions for the construction of such plants, beds and devices for use on any established drain may be filed by the same persons and shall be received and all proceedings had thereon in the same manner as other petitions for any drainage construction under this act. Plans and specifications for the construction as part of a drain of any disposal plant, filtration bed or other mechanical device to

properly purify the flow of such drain shall be prepared, subject to the approval of the state commissioner of health, and shall be filed with the drain commissioner. Contracts for such construction shall be let in the manner provided in chapter eight of this act. To meet the cost of such construction the drain commissioner shall apportion the per cent of such cost among the several parcels of land, highways and municipalities benefited thereby. The costs and charges for maintenance shall be apportioned and assessed each year. In case the apportionment shall be the same as the last recorded apportionment, no day of review shall be necessary, but in case the apportionment shall be changed, notice of a day of review shall be given to such persons or municipalities whose percentage has been raised. Lands may be acquired as a site for the construction of such plants, beds and devices, and releases thereof may be obtained in the same manner as other lands for right of way as in this act provided.

Supreme Court of the U

OCTOBER TERM, 19

No. 287-288



SUBJECT INDEX

	Page
Brief in opposition to Petition	1
Corrections in and Additions to Summary statement of petitioners	1
Argument	8
Question actually presented by petition	8
Questions petitioners say are involved in petition	9
I. Petitioners Right to Recovery is Foreclosed by the Decision and Decree of the Michigan Supreme Court in the Case of Oakland Hills Country Club v. Stack	11
Bondholders' Contention that they had no Notice of the Proceedings in the State Court is not Tenable	18
It is not the Duty of this Court to Grant Certiorari	19
II. The United States Circuit Court of Appeals, Sixth Circuit, has not Decided Important Questions of Local Law Probably in Conflict with the Local Statutes and Decisions of the State of Michigan, as Contended for Petitioners in the Second Reason Given for Allowance of the Writ	22
(a) The Circuit Court of Appeals did not reject local interpretations of the drain statute as to the character of the improvement that the drain commissioner was authorized to construct	24
1. That even if it be assumed that the decision of the Michigan Supreme Court	

Page

decreeing the project to be illegal is not res judicata as to the petitioners, on the record of this case the project was illegal and the proceedings, including the bonds, were void because the project was conceived and constructed not with the primary purpose of furnishing drainage facilities but with the dominant purpose of furnishing sewage facilities 24

2. The Master, the District Court in Overruling Petitioners' Exceptions to the Master's Report, and the Circuit Court of Appeals were correct in applying the Michigan Supreme Court Decisions to the Record in this Case in their final determination that the Michigan Supreme Court has been consistent in its holding that the project is illegal and the proceedings void from their inception 28

(b) The Circuit Court of Appeals was Correct in its Decision on the Effect of the Recitals in the Bonds..... 36

1. Estoppel does not apply to the appellants who did not sign the bonds or make any representations pertaining thereto 37

2. Bondholders are not entitled to rely upon recitals in the bonds where the Drain Commissioner was completely lacking in jurisdiction to issue the bonds or to create any legal liability whatsoever in the undertaking 41

3. The collection of taxes to pay for the illegal projects would violate the due process clauses of Federal and State Constitutions 48

Page

(c) The Circuit Court of Appeals was correct in its holding that where the proceedings are plainly null and void under Michigan Law and that when the bonds which are a part of the proceedings are void, the tax officials are not under a duty to proceed to assess drain taxes or to maintain drain funds 50

(d) Petitioners' contention that the Court of Appeals ignored the effect of the statute prohibiting collateral attack on the drain proceedings is without merit 51

III. The Decision of the Circuit Court of Appeals in this Case is not in Conflict with the Decisions of the Circuit Court of Appeals, Eighth Circuit, or of this Court 53

Conclusion 55

TABLE OF CASES CITED

American Constr. Co. v. Jacksonville Ry. Co., 148 U. S. 372; 37 L. Ed. 486 9
American Surety Co. v. Baldwin, 287 U. S. 156.... 22
Atherton v. Anderson (C.C.A. 6th) 86 Fed. (2nd) 518 24
Brooks v. County of Oakland, 268 Mich. 637..... 38
Clinton v. Spencer, 250 Mich. 135.....3, 11, 29
5 CYC of Federal Procedure 2638..... 10
Chase City Bank v. Norwalk, 209 U. S. 431..... 10, 53
Detroit Fire and Marine Insurance Co. v. Oakland, 284 Mich. 130 4
Detroit Trust Co. v. Dingeman, 291 Mich. 170.... 6, 34

Page

Dixon Co. v. Field, 111 U. S. 83; 28 L. Ed. 360..... 8
Deery's Lessee v. Cary, 18 L. Ed. 653 37
Douglas v. Pike County, 101 U. S. 677..... 52
Erie Railroad Co. v. Tompkins, 304 U. S. 64....8, 14, 25, 52
Fetzer v. Johnson, 15 Fed. (2nd) 145..... 10, 53
Fuller v. Cockerill, 257 Mich. 35..... 49, 52
Godkin v. Rutterbush, 147 Mich. 116 16
Hankinson v. Deake, 265 Mich. 1..... 11, 27
Hansberry v. Lee, 311 U. S. 32..... 20
Hoad v. Van Wagoner, 278 Mich. 600 27
In re Woods, 143 U. S. 202; 36 L. Ed. 125..... 9
Kennedy v. Dingman, 272 Mich. 24..... 30
Kersh Lake Drainage District v. Johnson, 84 L. Ed. 634; 60 Sup. Ct. 640 .....3, 7, 14
Linseed King, 285 U. S. 502; 76 L. Ed. 903..... 10, 24
Layne and Bowler Corp. v. Western Well Works, 261 U. S. 387; 67 L. Ed. 712..... 54
Magnum Import Co. v. Coty, 262 U. S. 159; 67 L. Ed. 922 ..... 10, 20
New England Mutual Life Insurance Co. v. Mitchell, 118 Fed. (2nd) 414 22
Oakland Hills County Club v. Stack, 273 Mich. 703 .....3, 8, 11, 27, 28, 31, 51
Ruhlin v. N. Y. Life Insurance Co., 304 U. S. 202; 82 L. Ed. 1290 ..... 11, 55
Royal Oak Drain District v. Keefe, 87 Fed. (2nd) 786 ..... 25, 44
Spitzer v. Village of Blanchard, 82 Mich. 234..... 8, 46
Township of Lake v. Millar, 257 Mich. 135.....3, 11
Texas and N. O. Ry. Co. v. Brotherhood of Clerks, 281 U. S. 548; 74 L. Ed. 1034..... 10, 24
Township of Cooper v. Little, 220 Mich. 62..... 38

Page

Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 515; 81 L. Ed. 789 ..... 10, 24
Village of Oak Park v. Van Wagoner, 271. Mich. 450 ..... 11, 43, 49, 50
Village of Clawson v. Van Wagoner, 268 Mich. 148 11
Wuchter v. Pizzutti, 276 U. S. 13..... 18

CONSTITUTIONS AND RULES CITED

Constitution of the United States, 5th Amendment 48
Constitution of Michigan, Art. II, Sect. 16..... 48
Constitution of Michigan, Art. VIII, Sec. 15-a.... 49
Rule 53—Rules of Civil Procedure (E) (2)..... 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on Behalf of Themselves and All Other Owners and Holders of Bonds of Bloomfield Village Drain District and Bloomfield No. 1 Storm Sewer Drain District,
Petitioners,
vs.
BLOOMFIELD VILLAGE DRAIN DISTRICT, BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, ETC., et al.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

CORRECTIONS IN AND ADDITIONS TO SUMMARY STATEMENT OF PETITIONERS

Because of omissions and numerous inaccuracies in petitioners' summary statement, we take the liberty of adding the following:

Accurately put, petitioners seek something not covered by Supreme Court Rule No. 38, Sect. 5, but rather a rehearing of the opinion of the 6th Circuit. Then, as if conceding that the 6th Circuit correctly applied Michigan law, they ask this Court to withhold action on this petition

while they strive to induce the Michigan Supreme Court to make new law to support their contentions in the recently instituted case of *Highland Park v. Clark* (pages 12 and 44, petition).

Since petitioners bring this *Highland Park* case to the Court's attention, nothing in the record supporting their statement, we should be privileged to give further information of it to this Court. The herein questioned opinion of the 6th Circuit was filed on March 14th, 1941. A petition for rehearing was filed April 9, 1941, and on May 9, 1941 it was denied. The Record in the case of *Highland Park v. Clark* shows that a petition for a writ of mandamus to compel the payment of drain bonds not involved in this petition, was filed with the Michigan Supreme Court by the firms of Goodenough, Voorhies, Long & Ryan, Dykema, Jones & Wheat, and Thompson, Wood & Hoffman, attorneys for petitioners below, and others, on June 5th, 1941, after a stay of mandate had been secured from the 6th Circuit to permit a petition for certiorari to be made to this Court. On June 10th, 1941, an answer was filed by the respondent, Clark, Drain Commissioner of Oakland County, and on June 12th, 1941 the matter was at issue in the Michigan Supreme Court awaiting action at the October 1941 term. When counsel for Oakland County Drain Commissioner discovered later, when the brief of petitioners herein was served upon him, that the Highland Park mandamus proceeding was being urged upon this Court as a reason for delay in acting upon the petition herein, and that the proceeding was evidently instituted as an attempt to influence this Court, he asked for leave to amend his answer that he might bring before the Michigan Court the entire picture, including numerous issues of fact, this pending proceeding and the efforts of petitioners to create new law for the benefit of this matter. Action on such motion to amend is now pending. The only ques-

tions that can come before this Court are whether the 6th Circuit correctly interpreted Michigan decisions, at most a rehearing, and whether the principles of *Kersh Lake Drainage District, et al., v. Johnson,* 84 L. Ed. 634; 60 Supreme Court 640, were properly applied. Factual matters are at rest. If the first proposition is sound, as decided by the 6th Circuit, it does not matter what the effect of *res adjudicata* may be.

At the end of the first paragraph of petitioners' summary statement, the following should appear: The Supreme Court of Michigan in *Clinton v. Spencer,* 250 Mich. 135, decided in March 1930 that if a Drain Commissioner in Michigan built a sewer instead of a drain, the proceedings were void. In March 1932 the Michigan Supreme Court decided in *Township of Lake v. Millar,* 257 Mich. 135, that where a Drain Commissioner under a petition for a drain built a sewer, there was an entire want of jurisdiction for which the proceedings were void. Petitioners formed a committee in New York, and by a notice dated November 14, 1932 (Ex. 32 R. 444) circularized bondholders, calling attention to the Michigan Drain decision of 1932, and soliciting deposits of bonds for the purpose of commencing a suit in Federal Court "to determine all questions with respect to the validity of the bonds and assessments" (R. 445).

After the word "therefor" in the seventh line from the bottom of page 3 of the petition, the following should appear: The Supreme Court of Michigan in the *Township of Lake, supra,* and in *Oakland Hills Country Club v. Stack,* 273 Mich. 703, stated that attack upon drain proceedings by certiorari was not necessary where the proceedings were void and the Drain Commissioner was without jurisdiction, and that in such case a Court of Equity had jurisdiction. The case last cited passed upon and held void the identical proceedings involved in the petition herein.

On page 4 after the word "better" in the 9th line from the top, the following should appear: The Supreme Court of Michigan held in the *Oakland Hills* case, *supra,* that the proceedings in which the bonds in question were issued, were not in strict conformity to the drain law, and that the Drain Commissioner was without jurisdiction in taking those proceedings. The Master in this proceeding (R. 90-91) found that the projects were *ultra vires* under Michigan law, and illegal. This finding of the Master was confirmed by the District Judge, who adopted the Master's report, his findings, and conclusions as the opinion of the Court (R. 133).

Following the next sentence on page 4, the following should appear: With the money received the officers built the *illegal* drains referred to in the preceding sentence.

The sentence beginning with the word "objection" in the 18th line from the top of page 4 should read: Objection to the payment of the bonds and levy of taxes is based upon the claim that the so-called improvement was designed and built for the purpose of primarily constituting a sewer in violation of the drain laws of the State of Michigan, and upon the further ground that the Supreme Court of the State of Michigan expressly held in the *Oakland Hills* case, *supra,* and in the case of *Detroit Fire & Marine Insurance Company v. Oakland,* 284 Mich. 130, that the identical projects in question here were constructed in violation of law, and were void from their inception for want of jurisdiction in the Drain Commissioner. To the claim that the recitals in the bonds estopped the drain district from denying payment of them, the defendants answered that the Michigan Supreme Court held the Drain Commissioner was without jurisdiction, his acts void, his proceedings invalid; and that where there was a total lack of power to act recitals in bonds were without effect and no estoppel to deny the validity of bonds arose.

At the end of the word "storms" at the end of the sixth line from the bottom of page 4, the following should appear: The Supreme Court of Michigan in the *Oakland Hills* case, *supra,* on page 707, found that these identical drains were not laid out for the purpose of draining surface water, but as sewers, and after reviewing the nature and courses of project, stated that

> "* * * the origin of these drains indicates that they were intended as sewers. They were not constructed for the purpose of land drainage, but for sewerage purposes,"

and on page 708,

> "* * * this is not the case of a drain constructed through low land which it was necessary to drain in order to occupy. The land drained naturally. The sole purpose of the construction of the sewers in question was for sewerage purposes for the land which had been subdivided."

At the bottom of page 5 the following should appear: The decree of the Supreme Court of Michigan in the *Oakland Hills* case, *supra,* set aside the assessments levied against its lands, and dissolved any assessment district insofar as its land was concerned, and perpetually enjoined the County Treasurer, the County Auditor, the Drain Commissioner, and others, including the Auditor General of the State of Michigan, from ever collecting or attempting to collect the assessments levied, upon the ground that the Drain Commissioner acted entirely without authority in building a sewer, and because the proceedings were entirely void (R. 55 *et seq.*). The bonds involved herein were part of the proceeding, and no valid bonds could issue from proceedings that were unconstitutional and totally void from their inception.

At the end of the first paragraph on page 6, the following should appear: The answer filed by the defendants in the *Oakland Hills* case, *supra,* sets forth that the Drain Commissioner had issued bonds to persons claiming to be *bona fide* holders of said bonds, and further stated that suit was then pending on such bonds in the Federal Court, referring to this action (Ex. 24) (not printed in Record by stipulation R. 448). The Michigan Supreme Court record in the *Oakland Hills* case shows Goodenough, Voorhies, Long & Ryan, of counsel for the Drain Commissioner and others. In the brief filed in the Court below, it was also admitted that Mr. Long of this firm argued the case for the Drain Commissioner in the *Detroit Fire & Marine Insurance Co.* case, *supra,* involving these identical drains. In the *Detroit Fire & Marine* case, *supra,* page 131, the Court comments on the defense raised in that case, that bondholders were not parties to the suit, and that another suit was pending in the Federal Court on their behalf.

The sentence commencing in the 14th line from the bottom of page 7 should read: The Court of Appeals did consider the decision of the Michigan Supreme Court, *Detroit Trust Company v. Dingeman,* 291 Mich. 170, and held that it involved a separate drain project, and that the opinion neither curtailed nor limited the effect of the *Meyering Land Co.* (*Oakland Hills* case), *Detroit Fire & Marine Insurance Co.,* and *Township of Lake* cases, *supra,* which specifically adjudicate the illegality of both the *Bloomfield Drains* and the *Nine Mile-Halfway* drain (R. 455). Michigan Supreme Court decisions plainly differentiate, as the 6th Circuit did, between cases where sewerage was the primary purpose as in the *Oakland Hills* case, and where drainage was the primary purpose as in the *Detroit Trust-Dingeman* case. There is no conflict between the decisions, and the Michigan Court clearly makes the distinction.

At the end of petitioners' summary statement of facts on page 8, the following should appear: The Circuit Court of Appeals held in conformity with the decision in *Kersh Lake Drain District v. Johnson*, 84 Law Ed. 634, that the Drain Commissioner under Michigan law represented all parties to the proceeding, and that he represented the bondholders in the *Oakland Hills* case, *supra*, and that the bondholders were bound by the effect of the decision of the Michigan Supreme Court.

The statutory provision in the Drain Act prohibiting collateral attack on drain proceedings except by certiorari, was expressly held in the *Oakland Hills* case not to apply in this particular instance, a case where there was no jurisdiction on the part of the Drain Commissioner to construct the projects, in which case equity regardless of the certiorari statute, had jurisdiction. The argument concerning certiorari in the brief filed by Mr. Long's firm in the *Oakland Hills* case was identical with that now advanced. The Michigan Supreme Court in unmistakable language denied this contention (273 Mich. 709).

ARGUMENT

PRELIMINARY STATEMENT

Question Actually Presented by Petition

There is actually in the petition and there was before the 6th Circuit one question which completely disposed of the entire case. It was, *were defendants estopped by recitals in the bonds to deny liability upon them?* The drain was illegal. The Supreme Court of Michigan in *Oakland Hills v. Stack,* 273 Mich. 703, involving these identical drains, and in numerous other cases has decided a drain commissioner could not build a sewer under the drain act, and if he did, his acts were void, unconstitutional and entirelly without jurisdiction. Applying the Michigan Supreme Court's interpretation of a Michigan statute to the facts before him, the Master found the drains involved were illegal. The District Court adopted the finding. The 6th Circuit affirmed it. The law of this Court is plain. Estoppel by recitals does not apply where there is a total lack of power to act. *Dixon Co. v. Field,* 111 U. S. 83; 28 L. Ed. 360 (4 Sup. Ct. Rep. 315). It is likewise the law of Michigan. *Spitzer v. Village of Blanchard,* 82 Mich. 234. Here there was a total want of power to act. Hence, the doctrine of estoppel by recitals does not apply. The 6th Circuit sought and applied the law of Michigan in conformity with *Erie v. Tompkins.* This is not a proper subject for certiorari. Petitioners really seek a rehearing and a respite during which they shall try to change the law of Michigan. Petitioners' efforts to get a new Michigan decision are interesting. They created diversity of citizenship by Exhibit 32 (R. 444) and for eight years have been litigating in Federal Courts to have their bonds declared

legal. Now after their attorneys have sat in on and have argued identical cases in Michigan Courts, and after years in Federal Courts, they ask this Court to withhold action while they try in a case undoubtedly deliberately planned and commenced on June 5th, 1941, to accomplish in a few short weeks what they have been trying to do in Federal Courts for eight years.

Petitioners have no right to a writ of certiorari. Local law was ascertained and applied. What petitioners really want is a last minute chance to change the law of Michigan.

Questions Petitioners Say are Involved in Petition

We respectfully submit that the reasons relied upon by petitioners for the allowance of the Writ of Certiorari do not entitle them to the Writ.

1. Petitioners state as their first reason for the allowance of the Writ that due process is denied petitioners by the decision of the Circuit Court of Appeals holding that the decrees in taxpayers' suits in the state courts are *res judicata*. This question was fully briefed and argued by both sides in the Circuit Court of Appeals. This is not a case where a state statute or a state court decision is claimed to have deprived bondholders of their right to due process under the Federal Constitution, but a case where the Federal Circuit Court of Appeals, in passing upon the very argument now urged upon this Court by petitioners, decided that the bondholders have had their day in court and that the state court decisions are *res judicata*.

The discretion of this Court in granting Writs of Certiorari is exercised sparingly and with caution. *Amer. Constr. Co. v. Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372, 37 L. Ed. 486; *In re Woods*, 143 U. S. 202, 36 L. Ed. 125. We respectfully submit that the petition for certiorari in this case amounts to a request for a rehearing of

the issues already decided by the Circuit Court of Appeals and that petitioners are not entitled to such rehearing. In *5 Cyc. of Fed. Procedure,* paragraph 2638, it is stated:

> "It is clear that the writ will not issue merely to give the defeated party in the Circuit Court of Appeals another hearing nor to review evidence on mere questions of fact." *Magnum Import Co. v. Coty,* 262 U. S. 159, 67 L. Ed. 922.

2. Petitioners state as their second reason for the allowance of the Writ that the Circuit Court of Appeals did not decide issues in accordance with local law. Suffice it to say, therefore, that the issues of local law decided by the Circuit Court of Appeals were all fully briefed and argued by petitioners in the lower court and that said issues were decided by the Circuit Court of Appeals in accordance with local law. It now appears that petitioners are seeking a rehearing upon the decision of the Circuit Court of Appeals pertaining to issues of local law, and this rehearing they are not entitled to. *Magnum Import Co. v. Coty, supra.* It has been repeatedly held that on a question of fact the Supreme Court will accept the concurrent findings of the District Court and the Circuit Court of Appeals when supported by circumstantial evidence. *The Linseed King,* 285 U. S. 502, 76 L. Ed. 903; *Texas and N. O. R. Co. v. Brotherhood of Ry. and Steamship Clerks,* 281 U. S. 548, 74 L. Ed. 1034, and *Virginia Ry. Co. v. System Federation No. 40,* 300 U. S. 515, 81 L. Ed. 789.

3. The Circuit Court of Appeals has not decided the question of the power of Federal Courts to restrain action to enforce actions of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in *Fetzer v. Johnson,* 15 Fed. (2d) 145, a decision prior to *Erie v. Tompkins,* or in conflict

with the decision of this Court in *Chase National Bank v. City of Norwalk,* 209 U. S. 431. In the case at bar the Circuit Court of Appeals did not decide that if the bonds were for any reason held to be valid that the injunction of the state courts enjoining the collection of taxes could not be overridden. The Circuit Court of Appeals made no finding upon this question one way or the other, as may be readily seen from an examination of the Opinion of the Circuit Court of Appeals. Moreover, the contention of petitioners on this point is controlled by the decisions in the cases of *Erie Rd. Co. v. Tompkins, supra,* and in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, in which latter case this Court held:

> "As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

I.

PETITIONER'S RIGHT TO RECOVERY IS FORECLOSED BY THE DECISION AND DECREE OF THE MICHIGAN SUPREME COURT IN THE CASE OF OAKLAND HILLS COUNTRY CLUB v. STACK

In the case of *Oakland Hills Country Club v. Stack,* 273 Mich. 703, the Michigan Supreme Court in passing upon the same proceedings now under consideration by this Court, held as follows:

> "The principal legal question involved is whether this case comes within the rule of *Clinton v. Spencer,* 250 Mich. 135; *Township of Lake v. Millar,* 257 Mich. 135; *Village of Oak Park v. Van Wagoner,* 271 Mich. 456, or whether it falls within the rule of *Hankinson v. Deake,* 265 Mich. 1, and *Village of Clawson v. Van Wagoner,* 268 Mich. 148.

If a sewer was constructed in pursuance of a petition for a drain, the drain commissioner was without jurisdiction to establish it. *Clinton v. Spencer, supra; Township of Lake v. Millar, supra.*

This is not the case of a drain constructed through low land which it was necessary to drain in order to occupy. The land drained naturally. The sole purpose of the construction of the sewers in question was for sewerage purposes for the land which had been subdivided.

The owners of these subdivisions originally contemplated constructing their own sewerage system, but, finding the drain commissioner was willing to go ahead with the project if proper petitions were filed, circulated the petitions and obtained signatures for the purpose of establishing a drain, and having a sewerage system constructed at public expense. The drain is of approved type used in sewerage construction.

This case is stronger on the facts than either the case of the *Township of Lake v. Millar* or *Clinton v. Spencer,* and we think the proceedings void."

The decree entered pursuant to the opinion provided:

"And it is further ordered, adjudged and decreed that the Bloomfield Village Drain District created by said Drain Commissioner for the County of Oakland, in so far as it affects or includes the premises involved in these proceedings, is hereby dissolved and set aside in like manner as if such district had never included or affected said premises, and that all special assessments heretofore levied and spread upon the rolls of the Township of Bloomfield and County of Oakland against said premises, as a result of the construction of said Bloomfield Village Drain and Bloomfield No. 1 Storm Sewer Drain are hereby set aside and held for naught, and said premises are hereby freed and relieved from any assessments and the liens

thereof, in like manner as if such assessments had never been levied against said premises, and all such assessments against said premises shall be forthwith cancelled and removed from the books and records of the Treasurer of the Township of Bloomfield, the Treasurer of the County of Oakland, and the Auditor General of the State of Michigan.

And it is further ordered, adjudged and decreed that the Township Treasurer of the Township of Bloomfield, the County Treasurer for the County of Oakland, and the Auditor General of the State of Michigan, their successors in office, their agents, servants, representatives and attorneys, be and they are hereby perpetually enjoined from taking any proceedings of any kind whatsoever to collect any of said assessments and from enforcing or attempting to enforce payment of any such assessments from the owners of such premises, or through sale of the premises against which said assessments were levied, in any manner whatsoever.

And it is further ordered, adjudged and decreed that a copy of this decree shall be recorded in the office of the Register of Deeds for the County of Oakland, Michigan, and that upon such recording, said premises involved herein shall be cleared and relieved from any lien or encumbrance of title that may have resulted from the proceedings taken by the Drain Commissioner for the County of Oakland, and from all special assessments levied upon said premises as a result of such proceedings" (R. 55-56).

With reference to the binding effect of this decision on the Federal Courts the Circuit Court of Appeals properly held that the decrees in the State cases "construing as they do the Michigan County Drain Law, are binding upon this Court. Rulings of State Courts construing state statutes were binding upon Federal Courts prior to the announce-

ment of *Erie Railroad Company v. Tompkins,* 304 U. S. 64. Certainly since that decision the Federal Courts are governed by state law to a greater extent than formerly. • • •"

The present contention of Petitioners is that the bondholders are deprived of due process by the decision of the Circuit Court of Appeals holding that the decision of the Michigan Supreme Court in the case of *Oakland Hills Country Club v. Stack* is *res judicata* of the rights of the bondholders.

The legal issue involved has been clarified by *Kersh Lake Drainage District, et al., v. A. J. Johnson,* 309 U. S. 485, and by the decision of the Circuit Court of Appeals in this case. The important point decided in the Kersh Lake case is that under very similar circumstances and statutes it has been held by this Court that the Drain Commissioners do represent the bondholders. In the Kersh Lake case the Court stated:

> "As stated by the Supreme Court of Arkansas, the general jurisdiction of the Lincoln Chancery Court, under the State law, to render the 1931 and 1932 decrees is 'acknowledged,' and this determination by the State's highest court is binding upon us. However, petitioners' argument is that these decrees were void because certificate holders were not made parties in and had no notice of the chancery proceedings. Therefore, they contend that in giving effect to the State court decrees and treating them as *res judicata* in the present proceeding the court below deprived certificate holders of their property without due process of law in violation of the Fourteenth Amendment. Petitioners also add the contention that the 1932 State court decree was 'collusive as a matter of law.'
>
> "Although the Drainage District was not in terms legislatively declared to be a corporation, its

powers and limitations were similar to those of corporations and its Commissioners were comparable to corporate directors. Among the duties of the Commissioners—as provided by the very statute upon which the certificates involved here rest—were those of protecting and enforcing creditors' rights on obligations issued by the District. And the Commissioners in 1931 and 1932 litigated with the landowners the disputed question of proportionate amounts of the taxes due the District by virtue of drainage benefits received by the particular tracts here in question.

* * * * *

"These certificate holders were not entitled to be made parties in the Lincoln Chancery proceedings just as in practice creditors of a corporation are not, unless otherwise provided by statute, made parties in a suit between a stockholder and the corporation to determine liability on a stock subscription, between the corporation and a third person to recover corporate assets, or in a suit brought against the corporation by creditors, stockholders or officers. It has been held that bondholders are not necessary parties to and are bound by the decree—even if adverse to their interests—in litigation wherein an indenture trustee under a bond issue is a party and exercises in good faith and without neglect his contractual authority to represent and assert the lien securing the issue. And so are these petitioners bound by the decrees in the Chancery suit in which the Commissioners as parties appropriately asserted the lien for benefit of certificate holders—unless there was fraud or collusion.

"It is sufficient to state as to this contention that the issues of fraud and collusion raise no questions which the Supreme Court of Arkansas was not competent finally to decide."

It is apparent that a duty similar to that imposed on the Arkansas Drain Commissioners is imposed upon the Drain Commissioners in Michigan where Section 4936 of the Compiled Laws of Michigan for 1929 provides as follows:

> "Commissioner party to suit. Sec. 14. In any suit brought to set aside any drain tax, or in any way attacking the legality of any drain proceedings, the Commissioner shall be made a party to said suit."

The Michigan Supreme Court has definitely held that the drain commissioner stands as a representative of those who are interested in the drain and collection of the tax, in *Godkin v. Rutterbush,* 147 Mich. 116, where it is stated:

> "The obvious reason for the enactment of this provision was that the drain commissioner in a peculiar sense stands as a representative of those who are interested in the drain and in the collection of the tax. The purpose of the statute was to afford to the drain commissioner the opportunity to be heard in the proceeding."

On this point the Circuit Court of Appeals held:

> "There is no essential difference between the statutes of Arkansas and Michigan dealing with this situation. Neither statute provides that the creditors or bondholders shall be made party, the Michigan statute requiring only that in any suit brought to set aside any drain tax or in any way attacking the legality of any drain proceedings, the drain commissioner shall be joined as party to the suit (Section 14, c. 10 Act 316, Michigan Public Acts, 1923). In the Kersh Lake case, *supra,* the Supreme Court pointed out that the Arkansas statute contemplated 'that the commissioners should represent the collective and corporate interests of the district in litigation between the district and a landowner involving matters personal to the landowner.' The Supreme Court of Michigan has held

> that 'The drain commissioner in a peculiar sense stands as the representative of those who are interested in the drain and in the collection of the tax.' *Godkin v. Rutterbush,* 147 Mich. 116. This holding makes the Kersh Lake case squarely applicable to the instant case."

We respectfully submit that a proper interpretation of the recent United States Supreme Court decision in the Kersh Lake Drainage District case settles all the issues in controversy here and was authority for the holding of the Circuit Court of Appeals that the decision of the Michigan Supreme Court with reference to this particular project is *res judicata* as to the petitioners herein.

This Court in deciding the *Kersh Lake* case undobtedly laid down a ruling in line with the philosophy of *Tompkins v. Erie Railroad Co. (supra),* which destroyed *Swift v. Tyson* and the apocryphal postulates which it engendered. The municipal bond cases and other similar litigation which should have been governed by state law, would have been less prolific had the doctrine of *res adjudicata* been applied where bondholders allowed state courts to make decisions, which if not to their liking, they might relitigate in Federal Courts. The *Erie-Tompkins* and the *Kersh Lake* cases go a long way to remedy much of the confusion that arose in past years because *Swift v. Tyson* grew to unforseen proportions. Petitioners admit the *Kersh Lake* decision is sound (22). Their counterparts in that litigation objected in this Court just as strongly as do petitioners now that bondholders were not parties to the *Arkansas* suits and hence could not be bound by them. This Court said otherwise. In Arkansas the Court held taxpayers had paid all they owed. The result was bondholders would not be paid. The only difference is that in Arkansas the bonds were partially uncollectible. The difference between the Arkansas and the present decision is one of degree.

Bondholders' Contention That They Had No Notice of the Proceedings in the State Court Is Not Tenable

This point was overruled by the Circuit Court of Appeals in this case and a similar contention was overruled by this Court in the *Kersh Lake* case. In the *Kersh Lake* case this Court held that the bondholders were not entitled to be made parties and that they were bound by the Decree of the State Court, even though they received no notice of the action in the State Court where their interests were represented by the Drain Commissioner.

However bondholders actually did have notice of the proceedings in *Oakland Hills Country Club v. Stack, (supra).* Mr. Long of Goodenough, Voorhies, Long and Ryan, one of petitioners' attorneys, sat and counseled with the attorney for Oakland County and the Drain Commissioner through the hearing. His firm acted as counsel in the Michigan Supreme Court. He actually wrote the defendants' brief. He helped settle the decree in the Supreme Court. Mr. Long likewise acted as counsel, and argued in the Supreme Court of Michigan the *Detroit Fire and Marine* case *(supra).* All these matters were admitted by him in the District Court.

The case of *Wuchter v. Pizzutti,* 276 U. S. 13, is not applicable to the case at bar. The *Wuchter* case involves the validity of a statute of New Jersey providing for service of process on non-residents of the State in suits for injury by the negligent operation of automobiles on its highways. The distinguishing feature is that under the statute considered in the *Wuchter* case the service is made by leaving the Summons with the Secretary of State. The Secretary of State is not made a party to the suit and in no sense stands as the representative of the non-resident motorist

at the trial of the cause, so that obviously a means of notifying the non-resident is required; but in the present situation the Drain Commissioner is made a party to the suit and does stand as a representative of the bondholders.

It Is Not the Duty of This Court to Grant Certiorari

Petitioners ask for certiorari on the allegation that they have been denied due process of law by the decision of the Circuit Court of Appeals. The Circuit Court of Appeals held that the bondholders are bound by the decision of the State Court in an action by taxpayers against the Drain Commissioner, et al., attacking the validity of the drain proceedings and seeking a permanent injunction against the levy and collection of taxes, when the interests of the bondholders and others interested in the drain and the collection of the tax are represented by the Drain Commissioner.

Petitioners are not entitled to certiorari based upon the allegations in their Petition, because—

(a) The question of the binding effect of the State Court decision on the bondholders has already been fully briefed, argued and decided by three competent Judges of the Sixth Circuit Court of Appeals, an it was held by the said Circuit Court of Appeals that under the authority of the *Kersh Lake* case, *supra,* decided by this Court, that the decision of the Michigan Supreme Court in the case of *Oakland Hills Country Club v. Stack* is binding upon the petitioners herein. The Circuit Court of Appeals further stated that "there is no essential difference between the statutes of Arkansas (determinative of the *Kersh Lake* case) and Michigan dealing with this situation." Under the above circumstances there is no duty upon this Court to review the decision of the Circuit Court of Appeals

which has already passed upon the contention now urged before this Court. *Magnum Import Co. v. Coty,* 262 U. S. 159, 67 L. Ed. 922.

(b) Moreover, the case of *Hansberry v. Lee,* 311 U. S. 32, is not applicable here because in that case it was the decision of the State Court which, it was claimed, was in violation of the due process clause of the Federal Constitution, and the question of whether the said State Court decision violated the due process clause of the Federal Constitution had not been passed upon by a Federal Court and under those circumstances this Court very properly granted certiorari.

(c) The question of whether or not the lower court erred in holding that Petitioners are bound by the decision of the Supreme Court of the State of Michigan need not be decided by this Court because the decision of the Circuit Court of Appeals would have been the same regardless of its holding on the *res judicata* question. Petitioners admit this on pages 17 and 18 of their brief.

The first point decided by the Circuit Court of Appeals was that the recitals in the bonds do not estop the taxpayers, townships or municipalities or the County from raising the defense that the particular projects were constructed wholly without authority, and that the projects and all the proceedings thereunder, including the bonds which were issued as a part of the proceedings, are void. This point was decided on the well known principle of law that there can be no estoppel by recitals against parties who did not join in the recitals, and in this case the recitals were executed only by the Drain Commissioner on behalf of the Drainage District so that even if estoppel did arise, no party, with the exception of the Drainage District, could possibly have been bound by the said recitals.

The second point decided by the Circuit Court of Appeals was that the Drain Districts were not estopped by the recitals in the bonds because it is the law of Michigan that where the Drain Commissioner is completely lacking in jurisdiction the proceedings are illegal and void and bonds issued to defray the expense of such proceedings are void in the hands of innocent holders since there can be no estoppel when there is a complete lack of jurisdiction. The Circuit Court of Appeals further held that the Federal Courts are bound to follow the law of Michigan under the rule stated in *Erie Railroad Co. v. Tompkins (supra)*.

So it is clear that regardless of the decision that the Circuit Court of Appeals came to on the question of whether the bondholders were represented by the Drain Commissioner and were bound by the Michigan decisions on these projects, the decision would still be that the Federal Courts must follow the Michigan decisions holding that where the Drain Commissioner built a sewer he was without jurisdiction, that the proceedings were void, that the taxpayers, townships, municipalities, counties and Drain Districts were not estopped by the recitals in the bonds and that the bonds issued as a part of the proceedings where there is a total lack of power are void.

We, therefore, respectfully submit that this Court should not grant certiorari to review a question which has already been fully considered and decided against Petitioners by the Circuit Court of Appeals and which, even if it were decided in favor of Petitioners, would not change the decision of the Circuit Court of Appeals in its holding that the bonds are void.

II.

THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, HAS NOT DECIDED IMPORTANT QUESTIONS OF LOCAL LAW PROBABLY IN CONFLICT WITH THE LOCAL STATUTES AND DECISIONS OF THE STATE OF MICHIGAN, AS CONTENDED BY PETITIONERS IN THE SECOND REASON GIVEN FOR ALLOWANCE OF THE WRIT

At the outset of our reply to the second section of petitioners' Brief, we wish to point out that the cases of *New England Mutual Life Insurance Company v. Mitchell,* 118 Fed. (2d) 414, and *American Surety Company v. Baldwin,* 287 U. S. 156, cited on pages 24 and 25 of petitioners' Brief, are not applicable to the facts in this case. The quotation from the New England Mutual Life Insurance Company case applies to a situation where a federal court is called upon to make a decision on a local matter "where there has been no decision on the precise question" by the state court, but the Michigan courts have repeatedly passed upon the questions now before this Court. On the question of the validity of the bonds the Circuit Court of Appeals held:

> "While in the Michigan cases involving these projects the bondholders were not joined as parties, it is the law of Michigan that where the projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders, and this law we follow."

The American Surety Company case, *supra,* cited by petitioners, is not applicable here because the facts are different. In that case the United States Supreme Court withheld action on a petition for a writ of certiorari pend-

ing the action of the Supreme Court of Idaho with reference to actions involving the same parties and the same subject matter. It appears that if the Idaho Supreme Court had granted the relief sought by the American Surety Company there would have been no need for the United States Supreme Court to issue the writ of certiorari, so in that case this Court properly withheld action upon the petition for the issuance of the writ until the American Surety Company had exhausted its remedy in the state court. This Court then followed the decision of the Idaho Supreme Court.

However, the case of the *City of Highland Park v. Clark* is a mandamus action to compel the levy and spread of taxes to pay bonds issued for the construction of a project in a drainage district which is entirely foreign to the bonds, project and drainage district in this case. On the other hand this is a class suit on behalf of bondholders to determine the validity and force the payment of bonds issued to pay for an entirely different project. In effect, petitioners are asking this Court to withhold action on the application for the writ of certiorari in this case for an indefinite period of time pending the decision of the Michigan Supreme Court in an entirely different type of action between different parties and involving a different subject matter. Furthermore it is a new piece of litigation commenced by Petitioners' counsel in the court below after the Sixth Circuit had decided this case, in fact on June 5, 1941.

Since the Michigan Supreme Court has already ruled upon the invalidity of the very proceedings now before this Court, we respectfully submit that this court should not withhold its denial of the writ of certiorari in this case pending the decision of the Michigan Supreme Court in a case completely foreign to this case.

(a) THE CIRCUIT COURT OF APPEALS DID NOT REJECT LOCAL INTERPRETATIONS OF THE DRAIN STATUTE AS TO THE CHARACTER OF THE IMPROVEMENT THAT THE DRAIN COMMISSIONER WAS AUTHORIZED TO CONSTRUCT.

Our reply to paragraph (a) of the second reason given by petitioners divides itself into two points:

1. **That even if it be assumed that the decision of the Michigan Supreme Court decreeing the project to be illegal is not res judicata as to the petitioners, on the record of this case the project was illegal and the proceedings, including the bonds, were void because the project was conceived and constructed not with the primary purpose of furnishing drainage facilities but with the dominant purpose of furnishing sewage facilities.**

The Circuit Court of Appeals properly held that the findings of the Special Master, as confirmed by the District Court, determining the Bloomfield Village projects and the proceedings pertaining thereto to be illegal and void, should not be overruled unless clearly erroneous.

Rule 53, Rules of Civil Procedure, Subdivision (e) (2),

Atherton v. Anderson (C. C. A. 6th), 86 Fed. (2d) 518.

It has been repeatedly held that on a question of fact the United States Supreme Court will accept the concurrent findings of the District Court and the Circuit Court of Appeals supported by substantial evidence.

The Linseed King, 285 U. S. 502, 76 L. Ed. 903;

Texas and N. O. R. Co. v. Brotherhood of Railroad and Steamship Clerks, 281 U. S. 548, 74 L. Ed. 1934;

Va. Ry Co. v. System Federation No. 40, 300 U. S. 515, 81 L. Ed. 789.

The decisions of this Court following *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, make it unnecessary for Respondents to enlarge upon the established law that the Federal Courts must follow the decisions of the State Court in interpreting the drainage statute and the limits of the jurisdiction of the Drain Commissioner. The Circuit Court of Appeals of the Sixth Circuit in the case of *Royal Oak Drain District, et al. v. Keefe, et al.,* 87 Fed. (2d) 786, in which case counsel for Petitioners herein represented the bondholders, had occasion to interpret the Michigan statutes and determine the jurisdiction of the Drain Commissioner and in so doing properly applied the tests of legality and limits of jurisdiction used by the Michigan Supreme Court in interpreting the Michigan drain statutes and the jurisdiction of the Drain Commissioner. The Circuit Court of Appeals there determined the project to be a legal drain, constructed through legal proceedings, and in doing so found:

1. The ditches were inadequate for the then existing population.

2. There were occasional spots where water stood during wet periods and in the extreme southwest there was a tract of more or less indefinite limits, commonly known as the Hubbard Marsh, which was swampy in character.

3. As the territory grew more urbanized, the ditches were more or less neglected and in 1924-1925 considerable areas between the Hubbard Marsh and the Twelve Mile Road had become marshy and water-logged.

4. "Much of the impetus" to the project was the marshy condition of a large part of the district to be served and the inadequacy of the county ditches which were to be supplanted to take care of the surface water of the area.

5. As in *Kennedy v. Dingman*, 272 Mich. 24, the existing cities of Royal Oak, Ferndale, Berkley, Pleasant Ridge and Huntington Woods, and the Villages of Oak Park and Clawson had sewage facilities and the project was for relief in the way of both sewage and drainage facilities.

6. The depth was sufficient to allow basement drainage from adjacent buildings only.

7. Michigan Supreme Court had not determined the character of the project as a sewer or drain.

Applying these tests to the case at bar, we find:

1. That the Bloomfield Village District drained naturally. In the subdivided land the contour of the land was such that streets were laid out following the natural surface drainage (R. 273-274).

2. In the subdivided portions of the Bloomfield Hills section, the natural drainage was so sufficient that a system of sanitary sewers had been partly installed. No drains had been installed because the land drained naturally (R. 274).

3. After the Bloomfield Village drain was constructed, the previously constructed sanitary sewer system was connected to it and emptied into it (R. 275-276).

4. There was no need for drainage for the Oakland Hills Country Club property. The land drained naturally, and drained just as well before the construction of the project as after. The project followed the same course, water from the club property followed before through natural water courses (R. 361, 362, 363, 364, 365, 366.) (Master's Report 88).

The Supreme Court of Michigan held the Bloomfield Village project to be sewers, and stated:

> "This case is stronger on the facts than either the case of the *Township of Lake v. Millar,* or *Clinton v. Spencer,* and we think the proceedings void" 273 Mich. 709.

In addition to the tests which the Circuit Court of Appeals of the Sixth Circuit applied in coming to its decision in the Royal Oak case, this question must be construed in favor of respondents and appellants below because of the following undisputed facts:

1. The project, as designed, was a closed conduit deep enough underground at the upper end and throughout the assessment district so that laterals simultaneously constructed by real estate subdividers furnished sewage facilities, at basement levels, for the area, which construction is essential for sewage purposes and is not essential for surface drainage purposes (R. 338 to 346).

2. The joints in the project were closed to prevent land drainage and to prevent the seepage of sewage, and the Michigan Supreme Court in the cases—*Oakland Hills Country Club v. Stack,* 273 Mich. 703; *Hankinson v. Deake,* 265 Mich. 1, and *Hoad v. VanWagoner,* 278 Mich. 600, and in other decisions gave material consideration to whether or not the joints were open or closed in determining, as is stated in the Oakland Hills case, whether they were constructed primarily for the purposes of land drainage, or for sewage purposes (R. 342).

3. The project was designed and built in some places with Y's for house connections so that the laterals would follows streets for sewage purposes. Michigan Supreme Court attached significant importance to this in the *Oakland Hills* case and other decisions showing the purpose to be to furnish sewage facilities. The undisputed testimony in this case is that connections were made by individuals without the consent of the municipalities and with

the consent of the Drain Commissioner as soon as the project was available for use (R. 275).

4. The plans, specifications and records of the proceedings frequently call this project a "sewer" and in various places plainly indicate that it was to be used for sewage disposal (R. 307-308).

5. Design and use of the project was primarily for the disposal of sewage. *Oakland Hills Country Club v. Stack,* 273 Mich. 709.

The Michigan Supreme Court in all its decisions had to interpret the drainage statutes so as not to do violence to Article VIII, Section 15a, of the Michigan Constitution of 1908, which reads:

> "Any drainage district, established under provision of law, may issue bonds for *drainage purposes* within such district." (Italics ours.)

2. The Master, the District Court in overruling Petitioners' Exceptions to the Master's Report, and the Circuit Court of Appeals were correct in applying the Michigan Supreme Court decisions to the record in this case in their final determination that the Michigan Supreme Court has been consistent in its interpretation of the Drain Act, and in its holding that the project is illegal and the proceedings void from their inception.

Petitioners when confronted with the decisions of the Michigan Supreme Court, the decision of the Circuit Court of Appeals and respondents' unanswerable contentions, now resort to the one argument that the legality of the bonds must be determined solely from an examination of a portion of the proceedings. They attempt to support this position by an analysis of the *Detroit Trust Company v. Dingman,* claiming, as set forth in the Statement of

Facts of their Petition, page 10, that the Circuit Court of Appeals did not properly consider the Detroit Trust Company case, and further, that the Michigan Supreme Court has not been consistent in following out its original interpretation of the Drain Act. There can be no dispute about the fact that the bonds are issued as a part of the proceedings, and petitioners in their statement of the case, page 3 of the Petition for Certiorari, so state. They refuse, however, to recognize the established law of the State of Michigan that the legality of the proceedings and the project constructed must be determined from a combination of circumstances and conditions, of which the proceedings are a part, and that the State Court has consistently held that where the Drain Commissioner exceeded his jurisdiction proceedings are void from their inception. We shall presently show that petitioners are wrong in their interpretation of the Detroit Trust Company case and that the Michigan Supreme Court has been consistent in interpreting the Drain Act and the jurisdiction of the Drain Commissioner.

In referring to *Clinton v. Spencer,* 250 Mich. 135, as the leading Michigan Supreme Court case, the Master held (R. 168, 169):

> "The only conclusion that can be drawn from this decision is that the court considers a project with a dual purpose, where the drainage purpose does not predominate, to be illegal.
>
> The Supreme Court has been consistent in following out its original interpretation of the Drain Act in subsequent cases, although because of the inevitable difficulty of weighing purposes in a combined structure the distinction between legal and illegal projects has at times become very fine."

As previously stated, the Bloomfield Hills project and proceedings were decreed illegal in the Oakland Hills case.

The court there held that the extent of the authority of the drain commissioner was measured by the statute from which he derived his authority and not from his own acts and assumptions of authority. This case has frequently been cited as authority by the Michigan Supreme Court and the Detroit Trust Company case has not changed the State Court's reference to it as precedent. In the Detroit Trust Company case the State Court stated that its decision came within the same Court's decision in *Hankinson v. Deake,* 265 Mich. 1, and *Kennedy v. Dingman,* 272 Mich. 24, and we cite these and other Michigan cases as a complete answer to petitioners' contention that the holdings of the Michigan Supreme Court no longer support respondents' contention. In *Hankinson v. Deake,* 265 Mich. 1, the State Court held, page 7:

> *"If the structure is a sewer, the drain commissioner was absolutely devoid of jurisdiction in the premises and the entire proceedings were a nullity and subject to attack by the methods employed herein. Township of Lake v. Millar,* 257 Mich. 135." (Italics ours.)

In *Kennedy v. Dingman,* 272 Mich. 24, the Court said, on page 27:

> "The LeBlanc drain is less like a sewer than the project involved in *Township of Lake v. Millar,* because it has no pumping station or filtration plant connected with it, but it is also more like a sewer than the project involved in *Hankinson v. Deake,* because it is monolithic construction without porous joints."

On Page 30, the Court stated:

> "In the case of the *Township of Lake v. Millar, supra,* as stated in the opinion, a sewer was built about 7½ miles long, in places 35 feet below the

> surface, with a circular concrete barrel ranging from 6 to 11 feet in diameter, and with a purifying plant for sewage treatment in connection therewith. *The record shows that the main and primary purpose was the construction of a drain and not a sewer, although in a few instances the latter use might become incidental.'* (Italics ours.)

In *Oakland Hills Country Club v. Stack,* 273 Mich. 703, on page 708, the Court said:

> "If a sewer was constructed in pursuance of a petition for a drain, the drain commissioner was without jurisdiction to establish it, *Clinton v. Spencer, supra; Township of Lake v. Millar, supra.*"

This case involves the projects in this identical petition and was decided after and distinguished from *Hankinson v. Deake* upon which the *Detroit Trust Co. v. Dingman* case was based.

Judge Simons of the Sixth Circuit Court of Appeals had these decisions before him when he held in the *Royal Oak* case, *supra,* that the Nine Mile project was a sewer and not a drain, as follows:

> "Doubt as to the legality of the proceedings was first entertained after the Michigan Supreme Court on March 7, 1930, in *Clinton v. Spencer,* 250 Mich. 135, invalidated assessments and enjoined the collection of taxes for the construction of the Southfield Drain. This was a large underground sewer entirely independent of any other drainage project, and its construction was held not authorized by the drain law. There followed *Kinner v. Spencer,* 257 Mich. 143, a decision to the same effect in respect to assessments for the identical project. Meanwhile, in *Township of Lake v. Millar,* 257 Mich. 135, the court enjoined assessment and collection of taxes for a project in Macomb County for the mainten-

> ance of a drain disposal plant, filtration beds and purification plant, which clearly marked the enterprise there as a sewer."

We submit that the Michigan Supreme Court was consistent in following out its interpretation of the Drain Act in the Detroit Trust Company case, and that this case is to be distinguished on the following grounds:

1. The drain commissioner testified and the record discloses that the primary purpose was drainage and that the furnishing of sewage facilities was incidental, whereas in the *Oakland Hills* case the record, including the testimony of the designing engineer and other engineers, discloses that the primary purpose was to furnish sewage facilities and that drainage was incidental. Complete answer to petitioners' contention that the legality of the proceedings, of which the bonds are a part, must, under Michigan law, be determined from an examination of the proceedings only, is found in the Detroit Trust Company case where the Michigan Supreme Court gave sufficient consideration to the testimony of the Drain Commissioner, who was an engineer, as to the purpose of the project to quote such testimony in its opinion on Page 176, as follows:

> "Q. Were you building this structure there to take their sewage, or to take their surface water; which?
>
> A. It was to take the surface water, the storm water, and the subsurface water, *and incidentally, the sanitary.* (Italics ours.)
>
> * * * * *
>
> Q. Would you say, in your opinion as an engineer, that the size of the filtration basin and septic tank would indicate that the disposal of sewage was incidental to the structure as a whole?
>
> A. Yes."

A study of the Detroit Trust Company case leads to the conclusion that the Michigan Supreme Court determined that there was an urgent need for drainage, and everyone connected with the construction of the project knew from the outset that the sewage factor would be incidental to the drainage and the Drain Commissioner so testified.

2. The Michigan Supreme Court held in the *Oakland Hills* case that the project was a sewer and that the dominant purpose was to furnish sewage facilities, and the same court held in the Detroit Trust Company case that the dominant purpose was drainage and that the furnishing of sewage facilities was incidental.

3. The record in the Detroit Trust Company case discloses that the project was part of a general plan for drainage and that the existing drainage was not adequate whereas in the *Oakland Hills* case the record discloses that the drainage was adequate and the project was part of a master plan for sewage disposal.

4. It is important to note that the Michigan Court in the Detroit Trust Company case considered how the project was used after construction in determining its purpose, the Court stating on page 177:

> "That this structure is in fact *effectively used* as a means of underground drainage for this district is indicated by the following testimony given by one of plaintiffs' witnesses who all his life had lived on Grosse Ile and at the time was highway commissioner." (Italics ours.)

5. The record in the Detroit Trust Company case discloses that a portion of the area had sanitary sewage facilities before the project was planned, whereas in the *Oakland Hills* case the entire assessment area was without sanitary sewage facilities.

6. The *Michigan Supreme Court Records and Briefs, Volume 3170,* substantiate our position as to the distinguishing of *Detroit Trust Company v. Dingman.* We quote from Page 49 of the brief of counsel for defendants and appellants:

> "The case of *Township of Lake v. Millar,* 257 Mich. 135, and decided March 2, 1932, was also an action to enjoin the assessment and collection of taxes for a project known as 'Nine Mile Half Way Drain' situated in Macomb County. From a perusal of the case and the type of the structure, and the prominence of a sewage disposal plant the court said, in substance, in its determination; in enjoining the assessment and collection of taxes, that the sewage disposal plant, filtration beds and purification plants clearly mark the enterprise in the *Township of Lake v. Millar* as a sewer, and the similarity of the structure as compared to the project involved in the case of *Clinton v. Spencer, supra,* whereas, in the instant case there are no filtration beds, nor is there a sewage disposal plant. There is, however, a small diversion chamber and septic tank negligible in size which the record discloses was built for the purpose of providing for the incidental need of such sewage as would be carried off by this drain.
>
> "In the *Lake Township* case the court said that the drain in question was similar to the drain involved in the *Clinton v. Spencer* case. It certainly cannot be said that the structure in the *Clinton v. Spencer* case and the *Lake Township* case and the attendant circumstances pertaining thereto are in any way comparable with Grosse Ile Tile Drain No. 4 as to their physical construction."

Again, in distinguishing the *Oakland Hills* case, 273 Mich. 703, the brief states on page 58:

> "In the case at bar, however, the record shows that there was a need for drainage, and that a plan

had been formulated for the drainage of the whole of the Island of Grosse Ile, and that drains one, two, three, eight and nine were constructed for the purpose of drainage, and that as a part of the originally formulated plan, Grosse Ile Tile Drain No. 4 was added to and became a part of the Drain Commissioner's plan for providing drainage for the Island of Grosse Ile (Ex. No. 3). The necessity for the drainage is clearly indicated in the forepart of this brief where it shows that the roads were in a bad condition; that there were low spots on the island, and that it was impossible for the citizens of the community to send their children to school. The record further shows not only these circumstances as indicating the necessity for drainage on the Island of Grosse Ile, but also the very minutes of the Township meetings relating to this particular area, evidenced the necessity and their desire for proper drainage in this particular community, and that the conditions were so acute that funds were appropriated for the purpose of defraying the cost of a survey of this particular area relative to drainage."

In the Detroit Trust Company case the court states the controlling question is whether the construction involved in this case was in good faith laid out and built as a drain or whether it in fact was conceived and constructed as a sanitary sewer. Applying this test to the *Oakland Hills* case leads to the one conclusion that the project was not in good faith laid out and built as a drain but was conceived and constructed with the dominant purpose of furnishing sewage facilities. The Supreme Court, in the *Detroit Trust Company* case, gives some consideration to Section 5, Chapter XVII of Act 365 of the Public Acts of Michigan for 1925, permitting the use of county drains for sewage disposal plants, and it is to be noted that the same court gave full consideration to this provision of the

law on the Nine Mile project in the *Township of Lake v. Millar* case, as is set forth in full on page 26 and referred to on page 31 of the brief of the drain commissioner and special counsel for the bondholders, Miller, Canfield, Paddock & Stone, appearing in *Volume 2360* of the *Michigan Supreme Court Records and Briefs.*

An examination of Section 5, Chapter XVII, of Act 365 of the Public Acts of Michigan for 1925, in conjunction with the history of and the record of the Bloomfield Village project discloses that sewage disposal was illegal, as part of a project in which the primary purpose was not drainage.

We respectfully submit that the Circuit Court of Appeals properly determined the entire proceedings void because the Drain Commissioner was absolutely devoid of jurisdiction in the premises and in doing so properly applied the Michigan Supreme Court decisions and did not, as contended by petitioners, decide an important question of local law in conflict with local statutes and decisions of the State.

(b) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS DECISION ON THE EFFECT OF THE RECITALS IN THE BONDS.

Petitioners in briefing the question as to the effect of the bond recitals have completely disregarded three important principles of law which are controlling as to the issue of estoppel in this case:

1. Estoppel does not apply to the appellants who did not sign the bonds or make any representations pertaining thereto.

It is the contention of respondents, other than the Drain Commissioner, that they are not estopped to deny the validity of the bonds because they did not sign the bonds, because they are not parties to the bonds and because they made no representations in respect to the bonds.

The whole theory of estoppel by recitals is that the obligor in the bond made certain statements or representations on the face of the bond of which said obligor would be subsequently estopped to deny the truth as against an innocent holder of said bond for value. The obligor in the bonds sued on is expressly stated to be the drain district only. The County of Oakland or the appellant townships not being obligors in said bonds nor parties thereto, obviously made no recitals or representations, and hence cannot be estopped.

It is elementary that the doctrine of estoppel arising out of recitals in bonds cannot apply as against appellants who are not parties to the bonds.

The United States Supreme Court in the case of *Deery's Lessee v. Cray,* 18 L. Ed. 653, stated:

> "* * * No person can rely upon estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. There is no mutuality, which is a requisite of all estoppels."

The Michigan Supreme Court has from an early date, as appears from decisions hereinafter cited, held that the Drain Commissioner is not the agent of the municipalities and the county, and there is no authority which can make

him the agent of any of the appellants to make representations or to enter into any mutual agreement. In *Township of Cooper v. Little,* 220 Mich. 62, the court said, on page 64:

> "In a long line of cases beginning with *Dawson v. Township of Aurelius,* 49 Mich. 479, this court has uniformly recognized that the fiscal affairs of a drain were separate and distinct from the general fiscal affairs of the municipality and *that the municipality was not bound or obligated by the acts of the drain commissioner.* Among the cases see *Camp v. Township of Algansee,* 50 Mich. 4; *Wallace v. Sortor,* 52 Mich. 159; *Taylor v. Township of Avon,* 73 Mich. 604; *Hillyer v. Township of Jonesfield, 114* Mich. 644; *Jenney v. Township of Mussey,* 121 Mich. 229." (Italics ours.)

On page 65, the Court stated:

> "These authorities conclusively establish the law to be that the municipality is not in any way interested in the fiscal affairs of the drain. The township is in no way chargeable with the acts of its officers in the administration of the drain law, *nor can the county be so chargeable.*" (Italics ours.)

See also *Brooks v. County of Oakland,* 268 Mich. 637, in which case the court made the following statement on page 639:

> "Moreover, the county is not liable for the refund of void drain taxes. The drain commissioner, in establishing the project, and the county treasurer, in taking and handling the assessments, *are not agents of the county* nor are the funds received for the use of the county. The officers perform special statutory duties for drainage districts. The reasons and principles governing township liability under similar statutes and set out in the following cases are applicable: *Taylor v. Township of Avon,*

73 Mich. 604; *Hillyer v. Township of Jonesfield,* 144 Mich. 644; *Brown v. Warner,* 159 Mich. 174. And *Township of Cooper v. Little,* 220 Mich. 62, in which the court, after a review of the authorities, said:

> 'These authorities conclusively establish the law to be that the municipality is not in any way interested in the fiscal affairs of the drain. The township is in no way chargeable with the acts of its officers in the administration of the drain law, nor can the county be so chargeable.'
>
> "Liability of the county is not established by 1 Comp. Laws 1929, section 4937, which provides for payment of principal and interest on bonds out of *general county funds* when the drain fund is insufficient." (Italics ours.)

We submit that under the authorities cited that even if the Drain Commissioner should be held to be estopped from denying the validity of the bonds, the other appellants are not so estopped. The bonds were signed by the Drain Commissioner only and the full faith and credit of the drainage district only is pledged. Appellants other than the Drain Commissioner made no representations in respect to the bonds. The Drain Commissioner is not the agent of appellants other than himself, and they are not bound by his representations or acts. There is no mutuality of contract between the holders of bonds and appellants, who did not sign the bonds or make any representations pertaining thereto. The elementary law under the authorities cited is that to create an estoppel there must be a representation by word or act of the party estopped, which has misled the party asserting the estoppel to his damage, and that the element of mutuality must be present.

The legal and logical conclusion, therefore, is that the appellants other than the Drain Commissioner could not be estopped to deny the validity of the bonds.

On this point the Circuit Court of Appeals properly held:

> "The theory of estoppel by recital is that the holder of the instrument is entitled to rely upon the facts recited in the bond. Each of the bonds in question certified that all acts had been done in order to make the bonds a binding obligation of the drain district. No bond makes any recital with reference to its being an obligation of the township or municipality in which the project is situated. Only one set of bonds, that of the Bloomfield Storm Sewer Drain District, recites the statutory obligation of the county to advance funds on the projects. None of the bonds is executed by any township, municipal or county officer, with the exception of the county drain commissioner and the county clerk. Under Michigan law the drain commissioner does not represent any political entity except the drain district, and his representations are in no way binding upon the townships, the municipalities or the counties, for none of these political subdivisions is chargeable either with the acts of the drain commissioner or with the acts of its officers in the administration of the drain law. *Township of Cooper v. Little*, 220 Mich. 62, 64. Moreover, the county is not liable for the refund of void drain taxes, since the drain commissioner does not act for the county in the establishment of the project. *Brooks v. County of Oakland*, 268 Mich. 637, 639. The county clerk is merely the clerical officer of the county. He has no authority to pledge the faith and credit of the county nor to certify on behalf of the county to facts stated in the bonds. His signature is placed upon the instrument as a certification of the authenticity of the signature of the county drain commissioner.

"We conclude that appellants other than the drain districts are not estopped to defend upon the ground of illegality of the various projects, and that as the proceedings are plainly null and void under Michigan law, the District Court erred (1) in ordering the appellants, municipal township and county officials in all cases, to proceed to assess drain taxes in these projects; (2) in issuing injunctions against such officers, and (3) in ordering the counties to make advancements into the drain district funds."

2. Bondholders are not entitled to rely upon recitals in the bonds where the Drain Commissioner was completely lacking in jurisdiction to issue the bonds or to create any legal liability whatsoever in the undertaking.

In section 2 (b) of petitioners' brief, a considerable amount of space has been devoted to the question of estoppel by recitals. However, it clearly appears that the Drain Commissioner was without jurisdiction and that the proceedings were illegal and void in their inception. In the case of *Township of Lake v. Millar, supra,* where the project was found and decreed to be illegal, the Michigan Supreme Court stated:

"Defendants contend, and the trial court held, that, plaintiffs not having attacked the regularity of the proceedings here involved by certiorari, are estopped from questioning their regularity in this proceeding.

* * * * *

"The question is presented whether a petition for a drain confers jurisdiction upon the drain commissioner to build a sewer; whether a petition to the drain commissioner to do something within the scope of his authority confers jurisdiction upon him to do something wholly without the scope of

his authority; whether a petition to do something he has a right to do confers jurisdiction upon him to something which he has no right to do; whether upon filing a petition for a drain which he has a right to build, the commissioner may lay out and construct a sewer which he has no right to build? A drain commissioner may not, by mere assumption of authority, legally do that which he has no authority to do. If, upon a petition to do what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but AN ENTIRE WANT OF JURISDICTION MAY BE TAKEN ADVANTAGE OF AT ANY TIME. The drain commissioner had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here ~~presented.~~ THE PROCEEDINGS ARE VOID FOR WANT OF JURISDICTION." (Emphasis supplied.)

See also the case of *Hankinson v. Deake,* 265 Mich. 1; *Kennedy v. Dingman,* 272 Mich. 24; and *Oakland Hills Country Club v. Stack,* 273 Mich. 703, where the Michigan Supreme Court decision on this project has been cited as a precedent for the established law that where the project is illegal, as in the case at bar, the Drain Commissioner was, as stated by the Michigan Supreme Court in *Hankinson v. Deake,* absolutely devoid of jurisdiction in the premises

and the entire proceedings were a nullity. It is also important to note that in the case of *Clinton v. Spencer,* 250 Mich. 135, the Michigan Supreme Court held the proceedings to be void from their inception. These Michigan cases clearly stating the law to be that where the Drain Commissioner is without jurisdiction the proceedings are void from their inception, are, of course, binding upon the Federal Courts under the doctrine of *Erie Rd. v. Tompkins, supra.*

Having established the fact that the proceedings were void in their inception, it follows that the bonds which were issued as a part of the proceedings are also void. The Michigan courts have repeatedly held that the doctrine of estoppel is not applicable where the projects are illegal because of a total lack of jurisdiction in the Drain Commissioner. It was so held by the Michigan Supreme Court in the case of *Township of Lake v. Millar, supra,* with reference to the question of estoppel against the taxpayers for failure to take certiorari proceedings and in the *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, the Michigan Supreme Court stated:

> "These authorities conclusively settle the law in this State that, property owners assessed for benefits, even though they participate in the improvement and fail to avail themselves of the statutory remedy for review, are not estopped to thereafter attack such proceeding, where the objections raised go to the jurisdiction and involve constitutional rights.
>
> "The general rules of estoppel, as applied to void acts, are thus summarized:
>
> 'In accord with the general rules already discussed, the rule is laid down broadly in many decisions that a municipal corporation is not estopped to deny the want of power to make a

> contract by receiving the benefits thereof; and it has even been held that a full performance by the contractor of a contract with a city which is void because opposed to the Constitution and laws and contrary to public policy will not prevent the city from pleading its want of power and the illegality of the contract. If the thing done is illegal or unwarranted by law, however beneficial it may be, the public is not estopped to deny its validity.' *21 C. J.*, p. 1214.
>
> 'The doctrine of estoppel cannot be applied against the city to validate a contract which it has no power to make, or which he ceded away, controlled, or embarrassed its legislative or governmental powers. Generally a municipal corporation is not estopped from denying the validity of a contract made by its officers, when there has been a total absence of authority for making such contract. And if the contract is absolutely *ultra vires*, the municipality is not estopped to deny its validity, though the benefits thereof have been received by the municipality.' *10 R. C. L.*, pp. 708, 709."

The Circuit Court of Appeals, Sixth Circuit, recognized the applicable rule of law in the case of *Royal Oak Drain District v. Keefe*, 87 Fed. (2d) 786, when it held:

> "The argument is pressed that the structure for the payment of which the bonds were issued was a sewer and not a drain, and so not under the jurisdiction of the drain commissioner under Michigan law. His acts are said to have been mere usurpations, and it is urged he was without power to issue bonds or create any legal authority in the undertaking. If the premise is sound, the argument is persuasive and based upon unimpeachable authority. *Anthony v. County of Jasper*, 101 U. S. 693, 697; *German Savings Bank v. County of Franklin*, 128 U. S. 526; and many other cases."

The Circuit Court of Appeals in its opinion in this case vell stated the applicable rules and cases on the point vhen it held:

> "The decrees in the *Meyering Land Co.* and *Detroit Fire and Marine Ins. Co.* cases, *supra,* construing as they do the Michigan county drain law, are binding upon this court. Rulings of state courts construing state statutes were binding upon federal courts prior to the announcement of *Erie Rd. Co. v. Tompkins,* 304 U. S. 64. Certainly since that decision the federal courts are governed by state law to a greater extent than formerly; but the effect of the holding of the District Court in this case is to set at nought the judgment of the state courts that these projects are absolutely void. The bonds do not recite that the various projects have been determined to be drains rather than sewers, and hence the appellants, in seeking to show that they are in fact sewers and illegal, are not seeking to establish any facts inconsistent with the recitals. While in the Michigan cases involving these projects the bondholders were not joined as parties, it is the law of Michigan that where the projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of such propects are void in the hands of innocent holders, and this law we follow. *Erie Rd. Co. v. Tompkins, supra; Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202. The rule that where the issuing officials are completely lacking in power to issue bonds for the particular purpose, *bona fide* purchasers are not entitled to rely upon recitals in the bonds to the effect that the legal and statutory prerequisites have been complied with, was recognized in *Royal Oak Drain Dist. v. Keefe, supra.* There this court said that if the drain commissioner had no jurisdiction under Michigan law, he was without power to issue bonds or to create any legal

liability whatsoever in the undertaking. In this we followed the Michigan decisions. As declared in *Spitzer v. Village of Blanchard,* 82 Mich. 234, 244:

> 'It is not entirely accurate to say that holders of bonds issued by a municipal corporation will be protected as *bona fide* purchasers if the corporation could, under any circumstances, issue the same. This question was considered by the Supreme Court of the United States in *Dixon Co. v. Field,* 111 U. S. 89 (4 Sup. Ct. Rep. 315), where the proper distinction is drawn as to irregularities in the exercise of the power conferred and the total want of power to do the act. Where there is a total want of power, under the law, in the officers or board who issue the bonds, then the bonds will be void in the hands of innocent holders, the distinction being between questions of fact and questions of law. If it is a question of fact, and the board or officers are authorized by law to determine the fact, then their determination is final and conclusive. And although it may be contrary to the fact, yet, if recited in the bond that the necessary and proper steps required by law to be taken had been taken, then the municipality is estopped from denying that they were taken. But it is held that all persons are presumed to know the law, and if the law created conditions precedent upon which the right to act at all depended, and these conditions were not complied with, and the law appointed no board or officer to determine that fact, then there could not be an innocent holder of such bonds. *Bernards Township v. Morrison,* 10 Sup. Ct. Rep. 333.'

"This holding has never been reversed. Hence the test in Michigan as to estoppel raised by recitals in the bonds is whether the officials making the recitals are wholly without power in the premises. If so, no estoppel arises.

"Appellants rely upon certain Michigan decisions which they claim as *contra,* but they are distinguishable in principle. In *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, the villages themselves took part in a false recital, contrary to facts later sought to be asserted. In *Gibbs v. School Dist.,* 88 Mich. 334, there was not a total lack of power in the officials making the recitals, as here, but failure to comply with statutory provisions.

"We are unable, under the Michigan decisions with reference to these drains, to avoid the conclusion that the drain commissioners had no jurisdiction. The holding of the Michigan courts upon this subject is a conclusion of law and binding here. Since the drain commissioners were without jurisdiction, they were totally without power to make recitals binding upon the drain district, and this circumstance is fatal to any claim of estoppel. *First Wisconsin National Bank v. Bessemer Twp.,* 286 Mich. 426; *Spitzer v. Blanchard, supra; Chemical Bank & Trust Co. v. County of Oakland,* 264 Mich. 673. The recital 'that all acts, conditions and things required to be done have been performed as required by law, was a legal conclusion upon which no purchaser was entitled to rely. *First Wisconsin National Bank v. Bessemer Twp., supra.* An examination of the records which the statute required the drain commissioner to maintain (Section 10, c. 2, Act 316, Michigan Public Acts, 1923) would have revealed all the facts necessary for a determination that the project was illegal. A public official who is not empowered to issue bonds cannot create such power recitals which he may incorporate in the bonds he issues. *Portsmouth Savings Bank v. Ashley,* 91 Mich. 670."

Petitioners have cited numerous cases which are inapplicable because in said cases there was no finding that

there was a complete lack of jurisdiction in the parties who issued the bonds. Petitioners have repeatedly refused to recognize the fact that since the Michigan Supreme Court has held that the Drain Commissioner in this case was without jurisdiction, which decision was concurred in by the Circuit Court of Appeals, and since this Court must follow the Michigan decision the rule stated by the Circuit Court of Appeals, as follows, is clearly applicable, and any other arguments and citations of cases with reference to the effect of recitals in the bonds becomes academic. The Circuit Court of Appeals correctly stated the applicable rule of law in its opinion on this case (R. 461) when it held:

> "Since the Drain Commissioners were without jurisdiction they were totally without power to make recitals binding upon the drain district and this circumstance is fatal to any claim of estoppel."

3. The collection of taxes to pay for the illegal projects would violate the due process clauses of Federal and State Constitutions.

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be * * * deprived of life, liberty or property without due process of law. * * *"

Article II, Section 16 of the Michigan Constitution of 1908 provides as follows:

> "No person shall be * * * deprived of life, liberty or property without due process of law."

The Michigan Supreme Court has, on a number of occasions, held that the levy and collection of a tax to pay for a void project would constitute the taking of property without due process of law.

"Here we are not dealing with an irregular exercise of power on the part of the drain commissioner, or, with procedural defects in the proceedings under which the sewers were constructed. The statute did not authorize the construction of either project, or the assessment of the tax. The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances, no estoppel would arise to bar an action to restrain the collection of the void tax."

Village of Oak Park v. Van Wagoner, 271 Mich. 450.

"If, as we hold, defendants were wholly without authority to lay this drain, the ultimate result of assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort. * * * Where the officials acting in the drain proceedings are wholly without jurisdiction or authority to act, the proceeding is void, and equity has power to restrain."

Fuller v. Cockerill, 257 Mich. 35.

Article VIII, Section 15-a of the Michigan Constitution of 1908 provides:

"Drainage District Bonds. Section 15-a. Any drainage district established under provision of law, may issue bonds for drainage purposes within such district."

We respectfully submit that in view of the fact that the Drain Commissioner did not issue bonds for *drainage purposes* in accordance with the Michigan constitutional provision and that in view of the Michigan decision quoted above, the Circuit Court of Appeals decided this case in the only way it could have decided it in conformity with the State and Federal Constitutions and the law of the State of Michigan.

(c) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS HOLDING THAT WHERE THE PROCEEDINGS ARE PLAINLY NULL AND VOID UNDER MICHIGAN LAW AND THAT WHEN THE BONDS WHICH ARE A PART OF THE PROCEEDINGS ARE VOID, THE TAX OFFICIALS ARE NOT UNDER A DUTY TO PROCEED TO ASSESS DRAIN TAXES OR TO MAINTAIN DRAIN FUNDS.

Petitioners have sought by the use of one paragraph in the Circuit Court of Appeals' opinion to make it appear that the Circuit Court of Appeals held that regardless of whether the bonds are valid or invalid the tax officials had no power to proceed to assess drain taxes. The Circuit Court of Appeals made no finding on this point one way or the other. The statement referred to by the petitioners (R. 982) was made in the opinion of the Circuit Court of Appeals in which it also held that the bonds were void, and the petitioners' construction of the language used is incorrect and is not what the Circuit Court of Appeals held. However, even if the Circuit Court of Appeals had held what petitioners say it did, there is ample authority for such a holding in the Michigan decisions. In the case of *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, 459, the Michigan Supreme Court held:

> "Here we are not dealing with an irregular exercise of power on the part of the drain commissioner or, with procedural defects in the proceedings under which the sewers were constructed. The statute did not authorize the construction of either project, or the assessment of the tax. The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances no estoppel would arise to bar an action to restrain the collection of a void tax."

(d) PETITIONERS' CONTENTION THAT THE COURT OF APPEALS IGNORED THE EFFECT OF THE STATUTE PROHIBITING COLLATERAL ATTACK ON THE DRAIN PROCEEDINGS IS WITHOUT MERIT.

Petitioners admit the rule of law followed by the state court in *Township of Lake v. Millar, supra,* where the court held in passing upon these identical proceedings:

> "The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari but an entire want of jurisdiction may be taken advantage of at any time. * * * The proceedings are void for want of jurisdiction."

The argument now advanced by petitioners has been repeatedly asserted in the state court until it appears that the state court in *Oakland Hills Country Club v. Stack,* 273 Mich. 703, this identical case, became somewhat impatient with passing on the so-called usual claim, when it stated on page 709:

> "The usual claim is made that the proceedings must have been attacked by certiorari. This question has been passed upon by this court in *Clinton v. Spencer, supra; Fuller v. Cockerill,* 257 Mich. 35; and *Township of Lake v. Millar, supra.* I can add nothing to what was said in these cases upon the question of the necessity of resorting to certiorari. It is not necessary where there is no jurisdiction."

The Special Master gave full consideration to this provision of the law in his Report (R. 196) where he stated:

> "The Supreme Court of Michigan has held this statute does not apply where the Drain Commissioner has undertaken a project beyond his jurisdiction. *Township of Lake v. Millar, supra,* and other cases."

Petitioners did not file any exception to the last mentioned finding of the Special Master and cannot now raise the question.

The Master correctly found that the doctrine stated in *Douglas v. Pike County,* 101 U. S. 677, was a logical development of the doctrine announced in *Swift v. Tyson,* and that since that case has been overruled "it would seem that the superstructure of law erected on that case should fall with it" (R. 173).

Petitioners' argument is just another instance where they refuse to recognize the doctrine of *Erie Rd. Co. v. Tompkins,* 304 U. S. 694, and subsequent cases, as to the binding effect upon federal courts of state decisions, that except in matters governed by the federal constitution or acts of congress the law to be applied in any case is the law of the state.

Moreover, it must be admitted that it is the rule in Michigan that where the officials acting in the drain proceedings are wholly without authority to act, the proceedings are void and the collection of drain taxes from the appellants would be unconstitutional because it would deprive them of their property without due process of law. The Michigan Supreme Court so held in the case of *Fuller v. Cockerill,* 257 Mich. 35, in which it said:

> "If, as we hold, defendants were wholly without authority to lay this drain, the ultimate result of assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort.* * * Where the officials acting in the drain proceedings are wholly without jurisdiction or authority to act, the proceeding is void, and equity has power to restrain."

The argument of respondents that the assessment and collection of drain taxes for a project void for lack of jurisdiction in the drain commissioner would violate the constitutional rights of the respondents, has been more fully developed herein on pages 48 and 49.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS NOT IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, OR OF THIS COURT

Petitioners state as their third reason for the allowance of the writ that the Circuit Court of Appeals has decided important questions as to the powers of federal courts to restrain actions to enforce judgments of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals (Eighth Circuit) in *Fetzer v. Johnson,* 15 Federal (2d) 145, and in conflict with the decision of this court in *Chase National Bank v. City of Norwalk,* 291 U. S. 431. Petitioners say that the Circuit Court of Appeals in this case *apparently* decided an important question in conflict with the *Fetzer* case and the *Chase National Bank* case because it failed to restrain by its injunction parties before it in this case from using the state court decrees in a manner inimical to parties who seek relief before them. Petitioners' contention on this point is based upon a false premise. In this case the Circuit Court of Appeals did not decide that if the bonds were for any reason held to be valid that the injunction of the state courts forbidding the collection of taxes could not be overridden. The Circuit Court of Appeals made no finding upon this question one way or the other. There was no necessity for the Circuit Court of Appeals to pass on this question because the Circuit Court of Appeals

had found that the proceedings were void, that the doctrine of estoppel by recitals was not applicable, that the bonds were void and that the Bills of Complaint should be dismissed, so it is difficult to understand petitioners' contention when there could be no possible occasion for such a decision by the Circuit Court of Appeals and when in fact no such decision was made by the Circuit Court of Appeals. Even petitioners evidenced doubt of the correctness of their contention when they stated that "an important question which the Court of Appeals has apparently decided in conflict with this court * * *."

Since the Circuit Court of Appeals made no such decision we respectfully submit that this contention of petitioners is not a proper reason for granting certiorari. See the case of *Layne and Bowler Corp. v. Western Well Works*, 261 U. S. 387, 67 L. Ed. 712, in which this Court held that a writ of certiorari granted by this court to settle a conflict between decisions of two Circuit Courts of Appeal will be dismissed as improvidently granted if examination disclosed that there was in fact no conflict between the decisions. Since there is no decision by the Circuit Court of Appeals in this case upon the point raised by petitioners there is no basis for the allowance of the writ.

Even if the Circuit Court of Appeals had held what the petitioners have erroneously assumed that it held the fact that such a holding conflicted with the holding of the Circuit Court of Appeals (Eighth Circuit) in *Fetzer v. Johnson, supra,* or of this court in the *Chase National Bank* case would have no controlling effect here because the decision of the Circuit Court of Appeals in this case would have been based on the law of Michigan and the United States Supreme Court will not grant certiorari in a case where the decision of the Circuit Court of Appeals is controlled by state law solely because the decision is in conflict with the decision of other circuits.

Petitioners have also failed to take into consideration the effect on the *Fetzer* case of the holding of this Court in the cases of *Erie Railroad v. Tompkins, supra,* and *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290. If the Eighth Circuit Court of Appeals were to pass on facts in that case at this time there would undoubtedly be a decision to the effect that the decision of the Supreme Court of Oklahoma must be followed.

The decision of this court in *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290, is controlling as to petitioners' contention on this point:

> "As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

CONCLUSION

We respectfully submit that the Writ of Certiorari should be denied in this case, because:

The first reason advanced by petitioners is based upon an alleged violation of the due process clause of the Federal Constitution by the decision of the Circuit Court of Appeals. We have shown that the decision which petitioners seek to review did not deprive petitioners of their rights to due process and that in reality all that petitioners are seeking is a rehearing of matters adjudicated by the court below. Petitioners admit that the second reason advanced is not a proper reason for the granting of the Writ because it deals only with the application of local law by the Federal Court. We have fully answered this second contention and shown the substantial evidence to

support the decision of the Circuit Court of Appeals. The third reason is based upon a claimed apparent conflict between the decisions of the Circuit Courts of Appeal of the Sixth and Eighth Circuits and is not a proper reason because the Circuit Court of Appeals in this case did not make the decision that petitioners claim it did, and even if it be assumed that the court below made a decision in conflict with another Circuit the decision made was based on local law and is proper, because conflicts between Circuits are inevitable if the Federal Courts are to follow the law of the numerous states, and such conflicts are now permitted under the rule announced by this Court in *Ruhlin v. New York Life Ins. Co., supra.*

Petitioners either failed or refused to recognize that this Court in the Erie Railroad case overruled the doctrine of *Swift v. Tyson,* and we suggest that cases similar to the one at bar were a fundamental reason for the overruling of this doctrine.

It clearly appears from the records and the arguments of petitioners and respondents that petitioners have had their claims and rights finally adjudicated in both the federal and state court.

(a) The bondholders had their full day in court in these proceedings in which they were parties plaintiff, and the Special Master and the District Court made an independent finding of the illegality of the proceedings, which finding was concurred in by the Circuit Court of Appeals in its independent determination that "the proceedings are plainly null and void under Michigan law" and respondents are not estopped from denying the validity of the bonds. The judgment of the Circuit Court of Appeals, which conforms to the law of the state, finally determines the rights and claims of petitioners.

(b) The Circuit Court of Appeals in deciding the local issues properly found in substance that even if it had not made an independent determination of the illegality of the proceedings and the bonds under Michigan law, the bondholders had their day in court in the *Oakland Hills* case where the state court found and decreed the entire proceedings illegal and void for want of jurisdiction in the Drain Commissioner to do what he attempted to do, because under the state and federal authorities cited the Drain Commissioner represented the bondholders in said state court proceedings.

There is no merit to petitioners' contentions, and the Circuit Court of Appeals in its well-considered opinion clearly resolved purely local issues in favor of respondents.

JAMES R. BREAKEY, JR.,
Majestic Building,
Detroit, Michigan,
Counsel for Respondents.

(3)

Office - Supreme Court, U. S.
FILED
SEP 22 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,
Petitioners,
vs.
BLOOMFIELD VILLAGE DRAIN DISTRICT and BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, et al.,
Respondents

PETITIONERS' REPLY BRIEF

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners,
Penobscot Building,
Detroit, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

SUBJECT INDEX

Page

I. Constitutional Rights.

Bondholders deprived of due process by decision of Court of Appeals..... 2

II. Conflict with Local Law.

Introductory statement 6

(1) Whether the drains are improvements which could lawfully be constructed.... 10

(2) Effect of bond recitals..... 12

(3) Effect of statute prohibiting collateral attack on drain proceedings..... 20

III. Federal Courts may under proper conditions restrain parties from using state court decrees to impede tax collections..... 24

IV. Conclusion 25

Appendix—Petition (with some exhibits omitted) and answer in case pending in Michigan Supreme Court, City of Highland Park, et al., v. Clark, et al..... 26

INDEX OF AUTHORITIES

Decisions Cited

American Surety Co. v. Baldwin, 287 U. S. 156..... 7

Beals v. R. R. Co., 113 U. S. 290..... 4

Board of Commrs. Santa Fe County v. Territory of N. M. ex rel. Bird, 215 U. S. 296..... 19

Brooks v. Oakland County, 268 Mich. 637..... 19

Chase Securities Corp. v. Vogel, 61 S. Ct. 823, 110 Fed. (2) 607..... 7

City of Highland Park v. Clark, No. 41690, Mich. Sup. Ct. undecided 6

Page

City Co. v. Stern, 61 S. Ct. 823, 110 Fed. (2) 601..... 7
Clinton v. Spencer, 250 Mich. 135..... 13, 22
Cooper v. Little, 220 Mich. 62..... 19
Detroit Fire & Marine Ins. Co. v. County of Oakland, 284 Mich. 130..... 13
Detroit Trust Co. v. Dingman, 291 Mich. 170..... 11, 12
Donohue v. Russell, 264 Mich. 217..... 20
Erie R. R. Co. v. Tompkins, 304 U. S. 64.....9, 21, 24
First Wisconsin National Bank v. Bessemer Twp., 286 Mich. 426..... 17
Fuller v. Cockerill, 257 Mich. 35..... 21, 22
Gray v. Dingman, 279 Mich. 62..... 22
Great Northern Railroad Co. v. Sunburst Oil & Refining Co., 287 U. S. 388..... 21
Hankinson v. Deake, 265 Mich. 1..... 13
Hansberry v. Lee, 311 U. S. 32..... 2
Kennedy v. Spencer, 272 Mich. 24..... 13
Kersh Lake Drainage District v. Johnson, 309 U. S. 485 4
Kinner v. Spencer, 257 Mich. 142.....13, 14, 22
Keokuk, etc. Ry. Co. v. Missouri, 152 U. S. 301..... 4
Meyering Land Co. v. Spencer, 273 Mich. 703..... 13, 22
Michalik v. U. S. Gypsum Co., 298 U. S. 639, 76 Fed. (2) 115 7
People v. Salem, 20 Mich. 452..... 15
Pittsburgh, etc., Iron Co. v. L. I. Iron Co., 118 Mich. 109 20
Pomeroy v. National City Co., 296 N. W. 513 (Minn.) 7
Railroad Commission v. Pullman Co., 61 S. Ct. 643.. 8
Ranney Refrigerator Co. v. Smith, 157 Mich. 302.... 13
Schmid v. Merchants Dispatch & Transp. Co., 270 N. Y. 287 7
Spitzer v. Village of Blanchard, 82 Mich. 234..... 17
Stellwagen v. Dingman, 229 Mich. 159..... 20, 22

	Page
Swift v. Tyson, 16 Pet. 1	9
Thompson v. Magnolia Petroleum Co., 309 U. S. 478	8
Township of Clarence v. Dickinson, 151 Mich. 270	20, 22
Township of Warren v. Engelbrecht, 251 Mich. 608	22
Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 635	7
Village of Oak Park v. Van Wagoner, 271 Mich. 450	21

STATUTES AND COURT RULES CITED

Michigan Act 316 Public Acts 1923	10
Michigan Act 365 Public Acts 1925	10
Michigan Act 318 Public Acts 1931	5
Michigan Compiled Laws, Sec. 14960	15
Michigan Compiled Laws, Sec. 4927	5

TEXTS CITED

14 Am. Jur., p. 345	21
21 Corpus Juris Secundum, Sec. 194 b, p. 329	21
14 Corpus Juris, p. 1068, Sec. 1662	4
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, Sections 290 and 301	8

NOTE: In the accompanying brief reference to the printed record will appear in parentheses.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,
Petitioners,
vs.
BLOOMFIELD VILLAGE DRAIN DISTRICT and BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, et al.,
Respondents

PETITIONERS' REPLY BRIEF

We are quite familiar with this court's rule 38, and know that the writ of certiorari is sparingly granted. Yet running through the rule is the recognition that lower courts may commit grievous errors which this court should correct. The many cases in which certiorari has been granted and lower courts reversed proves the wisdom of supervisory jurisdiction in this court.

The rule implies that a fair showing of probable error by a lower court upon some question involving a constitutional right, a conflict with local law, or a conflict between the circuits, call for a review. All of these appear in this case.

I.

CONSTITUTIONAL RIGHTS

We think the court must reject the view advanced by respondents that a litigant cannot complain to this court that a court of appeals has denied him due process. If *Hansberry v. Lee,* 311 U. S. 32, had come to this court from a court of appeals, with a decision in identical terms with that rendered by the Supreme Court of Illinois, this court would have given the case the same consideration, the only difference being that it would then have been concerned with the application of the Fifth Amendment instead of the Fourteenth.

Without attempting to define due process, it surely means that a litigant must be given his day in court, with notice of the claim against him and a fair opportunity to be heard. When the court says that he has already had his day in court and must lose his case because some other tribunal has already decided against him in a case in which he is not a party, an appellate court would be remiss in its duties if it refused to at least consider the reasoning on which the lower court arrived at such conclusion.

When it appears that such reasoning is based upon a theory that someone else, whose interests are adverse to the litigant and who was never authorized to represent him in prior litigation, assumed to stand for him in such litigation, an appellate court must closely investigate the

reasoning upon which this unusual representative capacity is based.

In this case it is based upon a theory that one who purchases a bond of a Michigan drain district must deduce from a statute, which requires a taxpayer in a drain district who sues to cancel his taxes to join the drain commissioner, that he is conclusively bound in the future by adjudications made against the drain commissioner in such suits. We submit that there is such a wide gap between the express language of such statute and the interpretation which the court of appeals has placed upon it, that holders of drain bonds who find themselves denied relief because of this interpretation ought to be heard on the proposition that the interpretation is unsound. By Michigan law, the drain commissioner is only representative of the property owners and municipalities within the district, and there is no statute or decision which makes the commissioner a representative of bondholders.

We have already presented our view that the holding of the Circuit Court of Appeals that the state court decree in the taxpayers' case is *res judicata* against bondholders is so enmeshed in the argument of the Circuit Court of Appeals that it is impossible to extricate it, and still be certain that the conclusion would have been the same if this erroneous factor had not been considered (See p. 17 of our first brief.)

The argument that the Michigan Supreme Court, in *Meyering Land Co. v. Spencer and Stack*, 273 Mich. 703, had jurisdiction over bondholders because petitioners' attorney knew that this case was pending, is untenable. A personal decree against third parties cannot rest upon the ground that attorneys for such a party knew that a suit was pending, and were employed by one of the parties to

the suit to assist in arguing it. The court will note that most of the matter stated on page 18 of respondents' brief is information without any basis in the record (365).

We have no quarrel with the doctrine of *Kersh Lake Drainage District v. Johnson,* 309 U. S. 485, because the decision there is a sound exposition of the law with relation to the facts before the court. If the facts had been as they are here, that Johnson in his suit against the commissioners of the district had obtained a decree that the whole proceedings for the drain were void, this court would not have permitted such decree to stand as a former adjudication barring certificate holders to sue on their obligations. The court was merely applying a well recognized principle in the law of corporations that while a stockholder may not, by litigation between him and the corporation or its officers, in the absence of a creditor to be affected, litigate the corporate liability to the creditor, he may, in the absence of such creditor, litigate his own personal liability for an assessment on grounds personal to himself, such as the amount of his liability, whether it has been paid, etc. *14 C. J.,* p. 1068, Section 1662. This court has held that a decree against a corporation declaring bonds and a mortgage securing them to be void is not *res judicata* against bondholders, *Keokuk, etc. Ry. Co. v. Missouri,* 152 U. S. 301, although it has properly said, in *Beals v. R. R. Co.,* 133 U. S. 290, that a trustee under a trust mortgage, if sued in an action to cancel a mortgage, does represent bondholders so that the decree binds them. This is because the mortgage makes him their representative, and all bonds are purchased with that understanding. A trustee under a mortgage is selected by bondholders. He is under duty to act in their behalf in maintaining the security, and can be held accountable for failure to diligently and loyally perform his duties. A drain commissioner is selected without consultation of bondholders. No statute governing his

duties requires him to act in their behalf. He could, with entire impunity so far as personal accountability to bondholders is concerned, refuse to pay any attention to suits brought against him relating to the bond security.

The court of appeals could not have given very careful attention to the Michigan Drain Law, or it would have seen that in this state quite different provisions from those in Arkansas have been enacted to protect bondholders of a drain district against destruction of the security for their bonds. The theory of the Michigan law is that landowners must, during the proceedings, object to any wrongful acts or omissions occurring in the performance of the commissioner's duties. After a certain point in the proceedings, the assessments become binding, except in cases where due process has not been accorded. The lien of the tax is then perpetual until paid. Section 4927, Michigan Compiled Laws 1929, provides:

> "All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid."

Even in the few cases where taxes may be set aside because of a failure to observe the requirements of due process, the legislature has provided that bondholders shall not suffer, for Act 318 Michigan Public Acts of 1931, provides:

> "In all cases where assessments shall be set aside after contracts have been let or bonds sold, the decree shall make full provision for payment for work done and materials furnished under said contracts before the commencement of suit, and for the payment of such bonds and interest thereon, by reassessment according to benefits, or otherwise as equity may require."

II.

CONFLICT WITH LOCAL LAW

Respondents' protest against the course we suggest of awaiting the decision of a case now pending in the Supreme Court of Michigan, which will determine the local law on the questions involved here, is eloquent of their recognition of the error of the court of appeals. They want this case closed so that judges familiar with local law, and who have the last word as to what it is, can say nothing to upset the advantage they now possess.

We think it is trivial to argue that the case of *City of Highland Park, et al., v. Clark, et al.,* which the Supreme Court of Michigan will hear during the month of October of this year, can settle nothing so far as this court is concerned because it involves a different set of bonds. In an appendix to this brief we print a copy of the petition for mandamus filed in the Michigan Supreme Court (omitting exhibits except for the form of the bonds), and the answer to the order to show cause. This is sufficient to show that the crucial questions in this case are before the Michigan court. It must decide whether the drain law permits the building of projects which will afford complete drainage and sewerage service, whether, if such projects are illegal, bond recitals estop the district to assert such illegality against *bona fide* holders of the bonds, whether taxes must be levied to pay such bonds, and whether bondholders are protected by the certiorari provision of the law. It also must decide whether the decree in a taxpayer's suit is *res judicata* against bondholders. The appendix further refutes the idea that this is a trumped-up case to delay a decision here. Bondholders other than petitioners here, with other counsel representing them, own half of the bonds

involved and are entitled to sue for relief. Because they are citizens of Michigan, they must sue in the state court.

The precedent in *American Surety Co. v. Baldwin,* 287 U. S. 156, cited in our first brief, we think applicable to the point advanced that this court recognizes the desirability of postponing action on an application for a writ until the state court has decided some pending action which will settle local law. The fact that the same parties are involved in the state litigation is of no consequence. What this court apparently desires is a declaration by the state court of last resort of its view on a disputed question of local law. Since our first brief was prepared, other precedents have come to our attention. In *Michalek v. U. S. Gypsum Co.,* 76 Fed. (2) 115, a federal court of appeals had decided that a plaintiff was barred recovery by a local statute of limitations. Plaintiff applied for certiorari on the ground that the statute applied was wrongly interpreted, and that under a proper interpretation his suit was not barred. At the time another case, *Schmid v. Merchants Dispatch and Transportation Co.,* was pending in the state court, which was decided after the petition for certiorari was filed, in which the state court of last resort (270 N. Y. 287) held contrary to the opinion of the federal court of appeals that the statute should not be interpreted in a manner to bar a suit of the nature alleged in the federal court. This court deferred action on the writ for many months, awaiting the decision of the New York court of last resort, and when the same was rendered, promptly reversed the court of appeals on the ground that it had wrongly interpreted the state statute, *Michalek v. U. S. Gypsum Co.,* 298 U. S. 639, and remanded the case with directions to follow the New York decision.

During the last term of this court similar action was taken in *City Co. v. Stern and Chase Securities Corp v. Vogel,* 61 S. Ct. 823, cases involving the construction of a Minnesota statute of limitations. The court of appeals, in *City Co. v. Stern,* 110 Fed. (2) 601, and *Chase Securities Corp. v. Vogel,* 110 Fed. (2) 607, held that the statute should not be construed as barring plaintiff's claim. In an application for certiorari, petitioners showed that the same question was before the Minnesota court. This court deferred action on the application for ten months. When the Minnesota Supreme Court, in *Pomeroy v. National City Co.,* 296 N. W. 513, decided that the statute of limitations barred a similar claim and disagreed with the court of appeals, this court reversed the court of appeals, saying:

> "The petition for writ of certiorari is granted and the judgment is reversed. *Vandenbark v. Owens-Illinois Glass Co.,* 311 U. S. ..., 61 S. Ct. 347, 85 L. Ed. ..., decided January 6, 1941; *Pomeroy v. National City Co.,* ... Minn., 296 N. W. 518. The case is remanded to the Circuit Court of Appeals for further proceedings with respect to any questions not determined by the Supreme Court of Minnesota in the Pomeroy and Donaldson cases."

This general subject is treated in Robertson & Kirkham *"Jurisdiction of the Supreme Court of the United States,"* Sec. 290, p. 559, and Sec. 301, p. 602.

CF. *Thompson v. Magnolia Petroleum Co.,* 309 U. S. 478, and *Railroad Commission of Texas v. Pullman Co., et al.,* 61 S. Ct. 643.

This practice necessarily accords with the principle of avoiding conflict with state tribunals on matters of state law. Had the court done otherwise and lost jurisdiction,

a grave injustice would have been done to parties who had lost their cases in the court of appeals.

When this court decided *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and overruled *Swift v. Tyson*, 16 Pet. 1, it must have known that its labors would be increased in determining where conflicts existed with state law. The numerous cases decided as a result of the Erie Railroad Company case prove the mass of litigation entailed. While most of the cases on the subject which this court has heard involved an avowed disregard by a court of appeals of some state decision on the ground that it still could exercise an independent judgment, this court cannot draw a hard and fast line so limiting its jurisdiction. Cases are bound to arise where state decisions are so clearly wrongly interpreted, or where applicable decisions are disregarded or ignored on untenable grounds, that courts of appeal must be restrained in the interest of justice. If a litigant in the federal courts in a case brought there on the ground of diverse citizenship is entitled to be judged according to the law of the state, an erroneous construction of such law ought not to be overlooked merely because a court of appeals declares its purpose to abide by such law. If this court were convinced that a court of appeals wrongly applied or construed a decision of this court, while professing to follow it, it surely would not hesitate in an important case to take jurisdiction. We fail to see any fundamental distinction which should cause this court to deny certiorari when the question arises as to whether a court of appeals has actually followed state law.

When a court of appeals announces that it intends to follow state law and its opinion is in conflict with authoritative expressions of the state court of last resort, the difficulty may be that it has a wrong conception of how to arrive at a determination of state law. We think that this point

is largely the cause of our differences with respondents and the court of appeals. We believe that a brief consideration of this subject with reference to the various points decided will demonstrate the proposition that an erroneous process of reasoning colors the various conclusions reached by the court of appeals on this subject.

1. Whether the Drains Are Improvements Which Could Not Lawfully Be Constructed.

The basic guid on this subject is the statute; next comes its interpretations by Michigan courts. The facts as to how the drains were constructed and the character of the territory are not in dispute; hence the decision as to the drain's legality becomes a pure question of law, and was so treated by the trial court.

At the outset, we must note that the court of appeals, while professing to adopt the finding of the trial court as embodied in the confirmed master's report, did not do so. The court of appeals says (455) that the construction is "predominantly for sewer purposes." The report, however, says (89) the projects were constructed with the purpose of "providing for a complete system of both sewerage and drainage in the area through a partially urbanized stage of development (90). * * * A project constructed for the dual purpose of providing sewerage and drainage throughout all property in the district, where neither purpose can be found clearly dominant, is illegal under Michigan law."

This error by the court of appeals in stating the master's finding is not a trifling inaccuracy, for it is important to know under Michigan law whether sewage removal is actually the predominant or primary purpose. If not, the presumption of legality is not overcome.

The error of the court of appeals, as we see it, is that it ascribes to a decree of the Michigan Supreme Court with respect to this drain a statement of fundamental principles which should guide courts in deciding the issue of whether this is a drain or sewer, no matter what facts are presented or what new principles of law the state court of last resort may have subsequently announced. The fact that a decree has been rendered based on a finding of illegality, causes, in the opinion of the court of appeals, this drain always to be illegal, no matter what facts are shown or who is showing them. On this theory, if a court once held a stream to be navigable upon evidence submitted in one case, no other party could by other evidence, or a showing of other principles of law, convince another court that the finding was incorrect.

Apparently realizing that the master's finding of facts does not support the conclusion of illegality, respondents, page 26 of their brief, submit their own reasons why these improvements should be called illegal.

They say that the land drained naturally. However, this cannot determine illegality. Probably no drain was ever installed where there was not some natural drainage. The petitions for these drains, one of which was signed by the respondent Oakland Hills Country Club (438), asked for a drain which will properly drain the lands, indicating that landowners were not satisfied with the natural drainage. The boards of determination decided that the proposed drains were necessary.

The fact that a small sanitary sewer previously constructed by a landowner was permitted to empty into the drain concludes nothing. The same was done in respect to the drain considered in *Detroit Trust Co. v. Dingman*, 291 Mich. 170. Respondents are not consistent on this point, for on page 33 they point to this previously constructed

sanitary sewer in the Detroit Trust Company case as a distinguishing feature, which justified the conclusion that the project there considered was legal.

Depth in the ground, tightly closed joints, and Ys or house connections, were conditions all present in the drain held legal in the Detroit Trust Company case.

There is no foundation for respondents' claim that these improvements were not laid out in good faith. The commissioner and his engineers, Weaver and Wrenn (272, 331, 338) testified at length and no conclusion can be reached from their testimony as to any wrongful intent.

It is impossible to read the master's report, with the testimony on which it is based, without arriving at the conclusion that if he had known that the Michigan Supreme Court would reverse the decision of the Circuit Judge in *Detroit Trust Co. v. Dingman (supra)*, he would have held these structures legal.

2. Effect of Bond Recitals.

The error in the court of appeals' opinion and our adversaries' argument on the effect of bond recitals is in using local authorities which have nothing to do with the subject as a guide for decision. The court of appeals says (460), after citing cases involving only controversies between taxpayers and assessing officials, that "it is the law of Michigan that where projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of the projects are void in the hands of innocent holders." There is no such decision in Michigan, and the court of appeals and counsel point to none. The only case where any effort was made to obtain an adjudication against drain bondholders was *Kinner v. Spencer*, 257 Mich. 142,

where the court expressly declined to pass on their rights because they were not parties.

Of the prior decisions from Michigan on which the court of appeals relies, *Clinton v. Spencer*, 250 Mich. 135, and *Kinner v. Spencer*, 257 Mich. 142, are not in point because there the petition expressly asked for the construction of a sewer. As the drain commissioner's jurisdiction rests upon a proper petition, *Ranney Refrigerator Co. v. Smith*, 157 Mich. 302, there was a want of jurisdiction from inception, thus causing the entire proceedings to be void. This the Michigan court points out in its later opinion in *Kennedy v. Dingman*, 272 Mich. 24, 30. In this and companion cases in this court, no complaint can be made of the petitions. They asked for drains to properly drain the lands. The quotation which the court of appeals takes from *Village of Oak Park v. Van Wagoner*, 271 Mich. 450, and all of respondents' quotations from the same case, appear in a minority opinion in that case signed by three justices, which the remaining five justices, though concurring in the result, refused to sign. In *Meyering Land Co. v. Spencer*, 273 Mich. 703, and *Detroit Fire & Marine Insurance Co. v. County of Oakland*, 284 Mich. 130, the court merely finds from the evidence before it that sewers, and not drains, were intended, and that the commissioner, therefore, lacked jurisdiction to levy the tax. Respondents (p. 30 of their brief) also ask the court to consider a passage from a dissenting opinion in *Hankinson v. Deake*, 265 Mich. 1, which they think is so important as to call for italics, but they conveniently omit to say that it is found in a dissenting opinion. Also in the quotation on the same page from *Kennedy v. Dingman*, 272 Mich. 24, 30, there are serious omissions from the language of the Michigan court, without any indication that anything has been omitted from the quotation.

What a state court has said concerning the rights of taxpayers to have their taxes cancelled if the improvement is

a sewer rather than a drain does not determine what should be said as to the rights of bondholders who bought their securities relying on the recitals therein. It is a fair inference from *Kinner v. Spencer (supra)* that the court recognized that bondholders might have rights and equities which would require a decision upholding their bonds if their claims were before the court. In the absence of any opinion by a Michigan court as to the rights of such bondholders under those circumstances, the court of appeals and counsel are not following Michigan law when they say that bondholders have no rights, but are merely guessing as to what the Michigan court would say if the question were presented.

There is a marked distinction between these taxpayers' cases and the present bondholders' case. In the former the court was not cognizant of the fact that bonds had been issued with these recitals, and purchased in good faith. It was only rendering judgment on the particular facts before it. What a court decides with an inadequate factual background, and without considering the rights of other parties not involved in the transaction, may be quite different from what it decides with full knowledge of the facts and with all parties represented. It is erroneous to reason in the reverse fashion pursued by respondents and the court of appeals. By this reasoning they start with an inquiry as to whether taxes would be valid for the kind of improvement constructed. Having assumed that the taxes would be invalid, they say that then the bonds must be invalid. Respondents argue that if there was no jurisdiction or authority to levy taxes because the improvement was illegal, then it must follow that all bonds issued by the district, no matter what representations were contained in them, must be invalid. An abundance of court decisions refute the argument. The principle of estoppel in favor of good faith bondholders is now uniformly accepted, which operates to prevent against

them the assertion of those facts on which taxpayers could otherwise rely to defeat the levy of taxes.

There being no opinion by a Michigan Circuit or Supreme Court either way on the precise question of whether a drain district is estopped by its bond recitals to deny that the project for which the bonds were issued was a drain, we must necessarily look to Michigan decisions involving other bond issues where the controversies are as nearly similar as possible.

We have four decisions in Michigan relating to village or city bonds, cited in our first brief, p. 28, which ought to be accepted as close analogies by anyone willing to transform the concrete to the abstract. In Michigan, as in most jurisdictions, the constitution either expressly or impliedly forbids taxation for any but a public purpose. *People v. Salem,* 20 Mich. 452. Taxation for a private purpose or the pledging of credit for such purpose is illegal. It surely is a greater wrong to a taxpayer to impose a tax upon him to enrich some individual or a corporation, than to impose a tax for a public purpose, but under a wrong statute. The four cases we have cited all recognize such illegality, and hold that no one who extends credit to a municipality to enable it to act in this *ultra vires* manner can recover, if he knows the *ultra vires* purpose. But they all also hold that if he extends credit upon assurances of the municipality that it desires the money for a legitimate purpose, he may recover. What happens if he recovers judgment? From almost the beginning of statehood, Michigan statutes have provided that judgments against villages and cities may be certified to some officer, whose duty it is then to levy and spread a tax to pay it. Sec. 14960, Michigan Compiled Laws 1929. Thus the taxpayers in the village or city ultimately must pay a tax which has for its foundation acts of its officials which are wholly beyond their jurisdiction. The

thoughtless would say that this is incongruous, but actually it is not. A municipality obtains the power to borrow money for its corporate needs, and in borrowing it must observe common rules of business honesty. People who choose to live in a municipality or own property therein subject to taxation must pay taxes to discharge debts which the municipality incurs. The tax levied to pay the judgment is not to promote the illegal object which prompted the creation of the debt, but to discharge an obligation imposed on the municipality by its false representations and pretensions. There is nothing strange or unusual in this result. It applies to private corporations, voluntary associations and partnerships. All may be estopped by acts which are performed in the name of the entity, by an agent acting within the scope of his authority.

In asserting impliedly that Michigan law is opposed to this uniform rule, the court of appeals must have failed to recognize in these four cases which we have cited the abstract principles which govern them. It has been misled by a meaningless slogan often asserted by our adversaries that there can be no liability where there is total lack of jurisdiction, without noting that most slogans are only half truths.

The slogan is, of course, true under some conditions. If by total lack of jurisdiction is meant a total absence of any delegated power under all circumstances, which a purchaser of a bond must know, because he is presumed to know the law, it is true. If it means lack of authority in the official who acts for the municipality because he has not been authorized to act for it in the business under consideration, it is also true. But if power has been delegated, to be exercised only on a condition, and the officer authorized to execute the power is the one directed to perform the condition, the representation he makes in the bonds, as

agent of the municipality in charge of obtaining the loan, is the representation of the municipality and estops it. The estoppel is not confined to mere procedural defects,—some failure to observe specified formalities. It applies to the most flagrant breaches of the law that can be imagined,—the most absolute abuses of the borrowing power.

The error of the Court of Appeals in rejecting the authority of these four Michigan decisions and advancing two other decisions, *Spitzer v. Village of Blanchard,* 82 Mich. 234, and *First Wisconsin National Bank v. Bessemer Township,* 286 Mich. 426, in support of the conclusion reached, is quite patent. These decisions do not support the claim that borrowing for an illegal purpose, and thus acting without jurisdiction, avoids the estoppel rule. They relate to the question of what facts recited by an issuing officer may not be relied upon. The facts which the officers in these cases recited were entirely outside the scope of authority of the officers. They were conditions required to exist and be known, but the legislature had prescribed other definite and readily accessible sources of information which would disclose their existence or non-existence. The bond purchaser failed to investigate the exclusive source of information prescribed. This is quite different from the facts here. In the drain bonds the matter relates to the acts of the commissioner himself, to the performance of his own duties. He had power and it was his duty to obviate every condition which would make this drain a sewer, to design it so that no court could say it was a sewer. He represented that he had done so. He certainly had jurisdiction up to the time he began to plan the drain. If what he planned was too deep in the ground, too large, too expensive, too intricate to be a drain, then he should have eliminated the objectionable features. No bond case can be found where an issuing officer, who had power and whose duty it was to make the recitals in the bonds true, is not held to have

authority to make the recitals. In several places in respondents' brief, they refer to events which occurred after the bonds were sold, e. g., specification 3 on page 26. While in taxpayers 'suits the court has at times referred to facts occurring subsequent to the levy of taxes, it has never laid down any rule that the validity of taxes can be affected by the use to which the improvement has been put. On grounds of simple logic, it is impossible to see how a tax once legally levied, or a bond legally issued, could become illegal by any unlawful acts of the municipality in handling the improvement constructed. At the time the bonds were issued, December 1925 (434), the drain had not been constructed, and no part of the proceedings taken prior to that time showed any violation of law, or any intent to issue the bonds for a purpose other than drainage within the district, as authorized in the constitution.

We will not enlarge on what we have said in our first brief in regard to the propriety of including in the judgment relief against parties other than the drain district. The relief against the County is based upon obligations laid upon it by the statutes of the state. It is the custodian of the drain fund, which it had in part wrongfully diverted and threatened to continue to divert. It had refused to advance moneys from its general fund for the payment of the bonds, as the statute commanded. Its duties were not assumed by any voluntary act on its part, but because the legislature had ordered that they be performed. The Oakland Hills Country Club and International Realty Company were taxpayers who threatened by every means in their power to thwart officers in the performance of their duties, by using decrees obtained by them in suits to which bondholders were not parties to prevent officers from performing their duties. The officers were the instruments selected by the law for the collection of the taxes. It was not essential that any of these parties should have signed the bonds,

there being nothing in the statute which required signature by any officers other than the commissioner and the clerk. There is no statute or Michigan decision to which the court or respondents can point which says directly or impliedly that duties which the district court judgment imposes upon these parties, other than the drain districts, can be avoided on the ground that they did not sign the bonds and, therefore, are not estopped to assert their invalidity as debts of the districts. It is as much their duty to recognize bonds held valid on the ground of estoppel, as bonds held valid on any other ground. *Board of Commissioners, Santa Fe County, v. Territory of New Mexico, ex rel. Bird,* 215 U. S. 296.

A consideration of *Cooper v. Little,* 220 Mich. 62, and *Brooks v. Oakland County,* 268 Mich. 637, cited by the court of appeals and respondents, shows their inapplicability to this case. No claim was there made in relation to taxes levied against the county under the drain law; no injunction was asked against it to enjoin wrongful use of judicial process in tax evasion. In the one case, the point involved was whether a suit against a drain commissioner was county litigation so as to relieve the appellant from paying a court fee. In the other, the point involved was whether illegally levied drain taxes could be recovered from the county, because they had gone into funds kept by the county, it appearing that they had been paid out to discharge debts of the district, and that the taxpayer had failed to comply with statutory requirements as to suits to recover taxes alleged by him to have been wrongfully imposed.

3. Effect of Statute Prohibiting Collateral Attack on Drain Proceedings.

Respondents' argument, p. 51 of their brief, that the court of appeals did not err in ignoring the proposition that the certiorari provision of the drain law prohibits collateral attack, wholly misses the point of our argument and fails to meet it. We point to the express terms of the statute, its interpretation at the time the bonds were issued in *Township of Clarence v. Dickinson,* 151 Mich. 270, and *Stellwagen v. Dingman,* 229 Mich. 159, wherein the court declares that the statute forbids all collateral attack where nothing more than a statutory violation is involved. We concede that after these bonds were issued the court has receded from the view formerly expressed, and now says that statutory violations of a jurisdictional character are subject to collateral attack. The point that they miss is that the Michigan Supreme Court has also held that changes in statutory construction subsequent to the accrual of rights under the prior construction are not applied retroactively to unsettle such rights. We cite two Michigan authorities which so hold, *Pittsburgh etc. Iron Co. v. L. S. Iron Co.,* 118 Mich. 109, 127, and *Donohue v. Russell,* 264 Mich. 217, 219. Respondents do not deny the fact that under the decisions prior to the issuance of these bonds the certiorari statute was interpreted as we contend it was, nor do they deny that in Michigan the rule of forward operation applies where to do otherwise would unsettle vested rights. These Michigan decisions accord with the rule stated in *14 Am. Jur.*, p. 345:

> "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. To this the courts

> have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. * * * The true rule in such cases is held to be to give a change of judicial construction in respect of a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative repeal or amendment; that is, make it prospective, but not retroactive."

The same rule is also stated in quite similar language in *21 C. J.*, Sec. 194, b. p. 329.

Had counsel examined Judge Cardozo's opinion in *Great Northern Railroad Co. v. Sunburst Oil and Refining Co.*, 287 U. S. 358, 364, they would have seen that this is not a peculiar rule in the federal courts, but that it applies quite generally. Certainly if the decisions of a state court establish it in the law of a jurisdiction, *Erie Railroad Co. v. Tompkins (supra)* requires federal courts to follow it.

Respondents urge, however, that to hold the bonds enforceable by applying this statute would result in the imposition of a tax which would be unconstitutional. (See p. 48 of their brief.) They cite in support of this, on p. 49, a passage from a minority opinion in *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, and also quote from *Fuller v. Cockerill,* 257 Mich. 35, which they repeat on p. 52.

What constitutional right of a taxpayer could be violated by imposing a special tax on his property for the benefit accruing to it from a sewer? Such improvements certainly are public enterprises and can be the subject of special assessments. The Michigan Supreme Court has

twice rejected the proposition that a subsequent amendment of the drain law authorizing the building of sewers and assessments therefor is unconstitutional. *Township of Warren v. Engelbrecht,* 251 Mich. 608; *Gray v. Dingman,* 279 Mich. 62. If this project was a sewer, the commissioner exceeded only a statutory authority and violated no constitutional provision, for the legislature could have declared in 1925, as well as in 1929, that a sewer could be built under the drain law. No intervening change in the constitution had occurred to give the 1929 amendment a constitutional basis, which it would not have had in 1925.

The nature of defects in drain proceedings which at the time these bonds were issued could be urged against the validity of taxes in collateral suits were only those which result from a failure to observe the requirements of due process. A commissioner may act without jurisdiction, as noted in *Township of Clarence v. Dickinson* and *Stellwagen v. Dingman (supra),* without violating due process. What he does may be wrong and without statutory authority, but that does not violate due process. From the time of the passage of the certiorari provision and until *Clinton v. Spencer,* 250 Mich. 135 (decided in 1930), there had been no Michigan decision permitting collateral attack on a drain tax, except where due process was violated. Either there was a lack of notice or fraudulent conduct of the officials in preventing an impartial hearing on some question vital to the taxpayer. It is only in *Clinton v. Spencer (supra), Kinner v. Spencer (supra), Township of Lake v. Millar (supra), Village of Oak Park v. Van Wagoner (supra)* and *Meyering Land Company v. Spencer,* 273 Mich. 703, all decided subsequent to the issuance of these bonds, that the court departed from its earlier rule and permitted an act involving only a statutory violation, un-

connected with notice or hearings, to open the door to collateral attack against the express provisions of the statute.

Fuller v. Cockerill (supra) is clearly not in point, for the drain there considered was one proposed under Act 462 of Local Act 1907. This local act applied only to Muskegon County, and contained no certiorari provision or language prohibiting collateral attack. The drain had not been built, contracts had not been let, and the defect urged was that the superintendent of drains was proposing to levy taxes for a drain wholly within a village, to which his territorial jurisdiction did not extend. The passage from the opinion quoted by respondents is undoubtedly true, for due process in special assessment proceedings requires that decisions be made and acts performed by an officer possesssing territorial jurisdiction. What the superintendent of drains was there proposing to do was the same as if the drain commissioner of Macomb County had attempted to perform the duties of a drain commissioner of another county.

The term "due process" may not be capable of precise definition, but it has never been held to apply where a party whose property may be subjected to a tax has had notice of the proceedings and an opportunity to be heard by a duly appointed officer acting within his territorial jurisdiction. It may have been a technical violation of the law to impose a tax upon the property owners of the drain district for an improvement which did not possess all the qualifications of a drain, but all taxpayers had notice of the proceedings and opportunity to object, and all, by failure to object and to follow same with certiorari proceedings, waived their objection.

III.

FEDERAL COURTS MAY UNDER PROPER CONDITIONS RESTRAIN PARTIES FROM USING STATE COURT DECREES TO IMPEDE TAX COLLECTIONS

It is true that the Court of Appeals does not in its decision expressly hold that it could not restrain the use of state court decrees to impede tax collections, but it is inferable from the opinion that it believes, as respondents contend, that *Erie Railroad Co. v. Tompkins* would now prevent such action. It says (457) that "sweeping injunctions" were issued by the district court, and that its decree is squarely at variance with the decree in the Meyering Land Company case (458).

We are concerned with this point because of the following reasoning. If this court should remand the case on the ground that the court of appeals erroneously decided that the bonds are invalid, we would be faced with the claim, as indicated by respondents in their argument on this point, that the district court erred in issuing these sweeping injunctions. They were necessary for the protection of bondholders, for if Oakland Hills Country Club and other taxpayers could institute contempt proceedings based on their decrees, should tax officials perform the district court decree, taxes against these particular taxpayers or their lands would be lost, thus diminishing the security on which the bonds rest. From past decisions by this court, we think the most likely course which this court would pursue if it takes jurisdiction and finds error in the Court of Appeals opinion, will be a remand, in which event we think it important that some declaration be made to the effect that the district court had power to make the injunctions as sweeping as it did.

IV.

CONCLUSION

We fail to see how respondents could misconstrue anything said in our petition and first brief to the effect that we deem conflict with local law an improper ground for this application. Rule 38 5b certainly indicates this as a proper ground, and we have invoked it. Too many cases brought to this court from a court of appeals have been reversed, where the only ground for certiorari is conflict with local laws, to suppose that this court considers the matter closed by a decision of the court of appeals.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

APPENDIX

Copy of Petition and Answer in City of Highland Park, a Municipal Corporation, Nathan Simons and Seymour Simons, Testamentary Trustees of the Estate of D. W. Simons, Deceased, Kenneth M. Keefe, Ernest E. Quantrell and Pelham C. Wilmerding, Relators, v. Earl L. Clark, Drain Commissioner of Oakland County, and Board of Supervisors of Oakland County, Respondents.

PETITION FOR WRIT OF MANDAMUS

To the Honorable Judges of the Supreme Court of Michigan:

The petition of the above named relators shows unto the court as follows:

1. That on June 2, 1927, proceedings were instituted under Act 316, Michigan Public Acts of 1923, and acts amendatory thereof, to establish a drainage district to be known as Royal Oak No. 7 Storm Sewer Drain District, in the Township of Royal Oak, Oakland County, Michigan. Said proceedings progressed in accordance with said statutes and resulted in the building of a drain, the levy of assessments therefor, and issuance of bonds in anticipation of the payment of said assessments. Attached hereto and marked Exhibit A, to which reference is prayed for greater certainty, is an abstract of the proceedings, which includes copies of petitions, orders and notices relating to the establishment of the district, petition for the drain, determination of necessity, first and final orders of determination, and order for the issuance of bonds in the par amount of $191,000.00. In the last mentioned order is the form of the bonds issued and specification of the maturities thereof.

2. The entire issue of said bonds was purchased by Watling, Lerchen & Hayes, of Detroit, Michigan, at a price of par or better and accrued interest, and payment therefor was made to the Treasurer of said County of Oakland. Said bonds were immediately resold by said firm to various investors, and the unpaid bonds are now held by relators. Except as stated in the bonds, parties who purchased the same knew nothing of the purpose of the drain to be constructed with the proceeds thereof, and purchased the same in good faith and in reliance on the matters of fact recited therein. Of the bonds now outstanding, 65 are held by City of Highland Park, which it purchased for its sinking fund during the year 1928, 10 are held by Testamentary Trustees of the Estate of David W. Simons, Deceased, which the said David W. Simons acquired also during the year 1928. The balance of 75 are held jointly by the remaining relators, Kenneth M. Keefe, Ernest E. Quantrell and Pelham C. Wilmerding, who constitute a Bondholders Committee. All relators are either themselves *bona fide* holders of said bonds for value, or acquired them from *bona fide* holders for value.

3. With the proceeds paid for said bonds by Watling, Lerchen & Hayes, the Drain Commissioner of Oakland County constructed the said drain along the route shown in the proceedings, Exhibit A. The structure is in the form of an underground conduit of reinforced concrete and vitrified tile, ranging from 54 inches in diameter to 12 inches in diameter. The drain district is for the most part subdivided, and the drain is laid in streets and alleys except for a portion laid through unplatted acreage. It has all necessary inlets to receive surface water, and has the size and capacity appropriate for removing all surface drainage water in the area, and has served this purpose since its construction. A few houses, which to July 1, 1932 did not exceed 19, have been permitted to connect with it for the purpose of removing household sewage.

4. For a period since May 1, 1931, the bonds have been in default due to the suspension of the levy of installments of the assessment for said drain during the years 1932 to 1936, inclusive. All bonds are now past due and interest is in default since May 1, 1940.

5. After prolonged negotiations for a settlement in relation to the bonds, relators agreed in writing with respondent, Earl L. Clark, Drain Commissioner, and other officers of the County, for a cancellation of 30% of the interest which had accrued on the bonds to May 1, 1940, and for the issuance of bonds to refund the indebtedness. A copy of their agreement is attached hereto and marked Exhibit B, to which reference is prayed. In accordance with said agreement, relators surrendered their coupons to the County Treasurer of said County and consented to an endorsement on their bonds of a receipt for all interest to May 1, 1940, and were paid a sum equal to 70% of the interest thereon which accrued to May 1, 1940.

6. Respondent Drain Commissioner thereupon applied to the Michigan Public Debt Commission for authority to issue refunding bonds, and on February 13, 1941, an order was entered by said Commission authorizing such issue. A copy thereof is hereto attached and marked Exhibit C, to which reference is prayed for greater certainty.

7. Relators are now informed by respondents that they will neither issue such refunding bonds, nor levy any taxes for the payment of the existing bonds. By an exchange of letters between the City Attorney of Highland Park and respondent Drain Commissioner, copies of which letters are hereto attached and marked Exhibits D and E, relators are informed that respondents consider that the existing bonds are invalid and that this is their ground for such refusal.

8. Since respondents, whose duties are to levy and spread taxes necessary to provide funds for the payment of relators' bonds, refuse to do so, and there is no other presently available source of money for their payment, relators are obliged to ask the aid of the court through the issuance of a writ of mandamus, to compel such levy and spread of taxes for said drain as is provided in Sections 4924, 4925 and 4940 of the Compiled Laws of Michigan, 1929. While relators would still be willing to accept refunding bonds as contemplated by the order of the Michigan Public Debt Commission, if same were tendered to them promptly, they are advised and believe that they may not petition for a writ of mandamus to compel the issuance of the same, since the matter of their issuance is discretionary with the Drain Commissioner.

Wherefore, relators, having no other available remedy, pray:

1. That this court issue under its seal a peremptory writ of mandamus directing and commanding the respondents, Earl L. Clark, Drain Commissioner of Oakland County, and Board of Supervisors of said County, to severally and collectively, as provided by Sections 4924, 4925 and 4940, Compiled Laws of Michigan 1929, perform such acts as will result in the levy, certification and spread of all unpaid portions of installments of taxes levied for said drain, and such supplemental or deficiency assessment as shall be sufficient to pay all outstanding bonds of said Royal Oak No. 7 Storm Sewer Drain District.

2. That an order to show cause issue to said respondents, directing them to make answer under oath to this petition, and therein to show cause, if any, why such writ of mandamus should not issue.

City of Highland Park, by Earl B. Young, City Attorney; Nathan Simons and Seymour Simons, Testamentary Trustees of the Estate of D. W. Simons, Deceased, by Levin, Levin & Dill; Kenneth M. Keefe, Ernest E. Quantrell and Pelham C. Wilmerding, by Irvin Long, Elroy O. Jones, Their Attorneys.

Exhibit A, attached to the petiton, is a transcript of the drain proceedings, with some abbreviations. Exhibit A-23 contains the bond form, as follows:

UNITED STATES OF AMERICA

Number	Dollars
52	1000

STATE OF MICHIGAN
COUNTY OF OAKLAND
ROYAL OAK NO. 7 STORM SEWER DRAIN DISTRICT BOND

KNOW ALL MEN BY THESE PRESENTS, that the Royal Oak No. 7 Storm Sewer Drain District of the County of Oakland, State of Michigan, is justly indebted and, for value received, hereby promises to pay to the bearer hereof the sum of

One Thousand Dollars

lawful money of the United States of America, on the FIRST DAY OF MAY, 1933, with interest thereon at the rate of 5½% per annum, payable semi-annually on May 1 and November 1 of each year on presentation and surrender of the annexed interest coupons as they severally

become due. Both principal and interest of this bond are payable at the GRISWOLD-FIRST STATE BANK, of Detroit, Michigan.

This bond is one of a series of One Hundred Ninety-one bonds of like date and tenor, except as to date of maturity, aggregating the sum of $191,000.00 issued under authority of and in full compliance with the provisions of Act No. 316 of the Public Acts of Michigan, 1923, as amended by Act No. 365 of the Public Acts of Michigan, 1925, and Act No. 331 of the Public Acts of Michigan, 1927.

The principal and interest of this bond are payable out of the installments of drain taxes assessed against the lands in the said district and against the City of Ferndale and the Village of Oak Park at large, in proportion to their respective taxation for such improvement as follows: lands in District 76.0688% City of Ferndale 15.7288% and the Village of Oak Park 8.2024%, and are issued for the payment of the cost of construction of the Royal Oak No. 7 Storm Sewer Drain in the Township of Royal Oak and the City of Ferndale in said Oakland County, under and in pursuance of the statutes aforesaid and by lawful authority, and the amount of said issue does not exceed the aggregate of the installments of such drain taxes levied, and in case the amount available in the drain fund for said drain shall be insufficient to pay the principal or interest of any of such bonds when they become due the same shall be advanced and paid by the County of Oakland out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the County shall not cause the total debt of the County to exceed the constitutional limitation thereof.

It is hereby certified and recited that all acts, conditions and things required to be done, precedent to and in the

issuance of this bond, in order to make it a binding obligation of the Royal Oak No. 7 Storm Sewer Drain District, have been done, have happened and have been performed in due form and time as required by law, and for the prompt payment hereof and of the interest hereon the full faith, credit and resources of said Drain District are hereby irrevocably pledged.

IN WITNESS WHEREOF, the Drain Commissioner of the County of Oakland for and on behalf of said Royal Oak No. 7 Storm Sewer Drain District has caused this bond to be signed by the County Drain Commissioner and countersigned by the County Clerk of said County of Oakland as of the second day of July, A. D. 1928.

.....

Drain Commissioner, Oakland
County, Mich.

Countersigned:

.....

County Clerk, Oakland
County, Michigan

COUPON

No..... ....

THE COUNTY TREASURER, of the County of Oakland, State of Michigan, will pay to the bearer of this coupon at the Griswold First State Bank, Detroit, Michigan, the sum of.....(.....) from the funds of the Royal Oak No. 7 Storm Sewer Drain District in said County, being the semi-annual interest due that day on its Royal Oak No. 7 Storm Sewer Drain District Bond, dated July 2, 1928.

No.....

....

County Clerk County Drain Commissioner

ANSWER TO PETITION FOR WRIT OF MANDAMUS

Comes now Charles L. Wilson, Prosecuting Attorney of the County of Oakland, by Harry J. Merritt, Corporation Counsel, statutory attorney for Earl L. Clark, Drain Commissioner of Oakland County and the Board of Supervisors of Oakland County and makes answer to said petition as follows:

1. They admit the allegations in the first sentence of paragraph one contained.

They deny the allegations in the second sentence in paragraph one, that a drain was built in pursuance of said proceedings, averring affirmatively that a sewer instead of a drain was built and that this Court so determined in *Village of Oak Park v. Van Wagoner,* 271 Mich. 450.

They admit the allegations in the third and fourth sentences in paragraph one contained purport to be copies of petitions, orders, etc. relative to the establishment of a drain district but aver that a drain was not constructed in pursuance thereof but a sewer.

2. They admit the allegations in the first sentence of paragraph two and neither admit nor deny the remaining allegations in said paragraph having no knowledge thereof and leave plaintiffs to their proof thereon.

3. They deny the allegations in the first sentence of paragraph three contained and affirmatively aver that the then Drain Commissioner of Oakland County constructed a sewer.

They admit the allegations in the second sentence of paragraph two contained.

They deny the inference that a drain district exists as alleged in the third sentence of paragraph three, deny that

a drain is laid in the streets and alleys averring the same to be a sewer.

They admit the allegations in the fourth sentence of paragraph three contained but aver that the same is a sewer and has been so held by this Court, and aver that the question as to whether or not the project was a drain or a sewer is *res adjudicata.*

They neither admit nor deny the allegations in sentence five of paragraph three contained having no knowledge thereof and leave plaintiffs to their proofs thereon.

4. They admit that the purported instruments which plaintiffs call bonds have been in default but deny that the instrument is a bond averring that under the Michigan decision and the Federal decisions the bond as such is a void instrument.

5. Defendant Earl L. Clark admits the allegations in paragraph five contained but Defendant Board of Supervisors of Oakland County denies that the agreement was executed with their authority or approval, affirmatively averring that it was beyond the scope of authority of the Drain Commissioner or the Board of Auditors, they being ministerial officers, and that such an agreement is void, without authorization of law and contrary to public policy.

6. Defendant Earl L. Clark admits the allegations therein contained but Defendant Board of Supervisors of Oakland County deny that such activities of the Drain Commissioner were with their approval or authority, that his activities in that connection were unauthorized, beyond the scope of his authority and of no force or effect as far as the Board of Supervisors of Oakland County are concerned.

7. They admit the allegations in paragraph seven contained.

8. They deny that there is any duty on their part to spread taxes in connection with said illegally constructed sewer, admit that they refuse to do so and affirmatively aver that it is their duty to so refuse, admit that there is no money presently available for payment but deny that this Court should issue its writ of mandamus to compel any levy or spread of taxes to provide money for an illegal project. They deny that either the Drain Commissioner or the Board of Supervisors has any right or duty to continue said contemplated refunding and admit the remaining allegations in said paragraph.

Wherefore respondents pray:

1. That the prayers in paragraphs one and two of relators' prayer be denied.

2. That the petition be dismissed, the matter being *res adjudicata.*

3. That respondents have costs of Court.

CHARLES L. WILSON,
Prosecuting Attorney.
By HARRY J. MERRITT,
Corporation Counsel.

(4)

Office - Supreme Court, U. S.
FILED
NOV 8 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PULHAM C. WILMERDING, on Behalf of Themselves and All Other Owners and Holders of Bonds of Bloomfield Village Drain District and Bloomfield No. 1 Storm Sewer Drain District,
Petitioners,
vs.
BLOOMFIELD VILLAGE DRAIN DISTRICT, BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, ETC., et al.,
Respondents

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners,
Penobscot Building,
Detroit, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on Behalf of Themselves and All Other Owners and Holders of Bonds of Bloomfield Village Drain District and Bloomfield No. 1 Storm Sewer Drain District,
Petitioners,
vs.
BLOOMFIELD VILLAGE DRAIN DISTRICT, BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, ETC., et al.,
Respondents

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI

The above petitioners hereby respectfully petition the Court to grant a rehearing on the petition for certiorari heretofore denied October 13, 1941, for the following reasons:

1. The decision of the Court of Appeals, Sixth Circuit, entitled *Bloomfield Village Drain District, et al., v. Keefe, et al.*, 119 F. (2) 157, conflicts with local law in the particu-

lars set forth in paragraph 2 of the reasons relied upon for allowance of writ in the petition for certiorari.

2. The Supreme Court of Michigan will, within a short time, decide a case which presents identical questions of law, which decision will be conclusive as to the applicable principles of law governing this case, and this Court should await such decision.

This motion is based upon the records and files herein and accompanying brief.

Counsel for petitioners hereby certify that this petition is presented in good faith and not for delay.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The accompanying motion is confined to those points which have to do with local law and on which federal courts cannot exercise an independent judgment. The petition for certiorari in paragraph 2 of the reasons relied upon for allowance of the writ sets forth the particulars on which petitioners believe that the Court of Appeals came to a conclusion opposed to local law. Briefly these points of conflict are: (a) holding the improvement is illegal under Michigan law, (b) holding that the bond recitals do not protect *bona fide* holders of the bonds against the claims of illegal action by the drain district and drain commissioner, (c) holding that estoppel of the drain district to plead illegality does not establish the duty of officers and others to provide funds for bond payments, (d) ignoring the point that under the drain law and interpretations in effect when the bonds were issued collateral attack was barred, and (e) ignoring the point that money collected and on hand for distribution to bondholders should be distributed irrespective of the validity or non-validity of the bonds.

By prior proceedings herein, and particularly by petitioners' motion to enlarge the time for filing a petition for rehearing, this court was advised that a case will soon be decided by the Supreme Court of Michigan in which points a, b, c and d are involved. We refer to *City of Highland Park, et al. v. Clark, et al.,* which has now been orally argued, and in which briefs have been filed. The opinion of the Michigan Supreme Court can now be expected within a few days or weeks.

While no one, except the Michigan Court, knows what the decision in the City of Highland Park case will be, we believe it must definitely declare the law of Michigan as to the kind of a drainage improvement the drain commissioner was authorized under the Michigan Drain Law to build, and even if it is decided that the drainage improvement there involved, which is similar to those involved in this and companion cases, was an illegal sewer rather than a drain, it must still decide whether the bonds are enforceable on the principle of estoppel.

The Court of Appeals' decision is based upon its conception of Michigan law. It in effect assumes that the Michigan court of last resort would be required to decide the case as it decided it. Within a very short time we will know whether this assumption is correct. Respondents in this case must recognize that the forthcoming opinion of the Michigan Court must either confirm what the Court of Appeals has decided, or flatly contradict it, for they have filed briefs *amici curiae* urging that the Court of Appeals' opinion ought to be followed.

The granting of a rehearing can visit no harm upon respondents, for if the Michigan Court decides as they urge it to do in their briefs *amici curiae,* it will end this case. As no money or property is withheld from respondents they will have suffered no loss as a result of the brief period of time during which the matter remains undecided. On the other hand, holders of these bonds will suffer great and irreparable loss if the Michigan Court should flatly disagree with the Court of Appeals and hold that it has wrongly construed local law, and the decree of the latter court stands without an opportunity to review. It will then mean that bondholders' rights have been judged by a conception of law proven to be erroneous.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

Office - Supreme Court, U. S.
FILED
MAR 6 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 287 - 288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Bloomfield Village Drain District and Bloomfield No. 1 Storm Stewer Drain District,
Petitioners,
vs.
BLOOMFIELD VILLAGE DRAIN DISTRICT, BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, ETC., et al.

PETITIONERS' SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR REHEARING

DAVID M. WOOD,
RAYMOND K. DYKEMA,
2746 Penobscot Building,
Detroit, Michigan,
Counsel for Petitioners.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

SUBJECT INDEX

	Page
Introductory statement referring to briefs filed in companion cases	1
1. Action by this court should be deferred until it is known that the opinions as filed by the Supreme Court of Michigan in City of Highland Park v. Clark is final and official	2
2. Even if the State Court's opinion remains in substantially the same form as the one on file, it demonstrates the truth of petitioners' contention that the lower court erred in determining local law	3
(a) Local court differs with lower court in regard to claims of *res judicata*	3
(b) Also in regard to effect of Thompson v. Mecosta, 127 Mich. 522	4
(c) Also in regard to inconsistency of bond recitals with claim of invalidity urged	5

INDEX OF AUTHORITIES

Detroit Fire & Marine Insurance Co. v. Oakland County, 284 Mich. 130	3
Meyering Land Co. v. Spencer, 273 Mich. 703	3
Royal Oak Drain District v. Keefe, 87 F. (2) 786	4
Schmid v. Village of Frankfort, 131 Mich. 197	4
Thompson v. Village of Mecosta, 127 Mich. 522	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 287 - 288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Bloomfield Village Drain District and Bloomfield No. 1 Storm Stewer Drain District,

Petitioners,

vs.

BLOOMFIELD VILLAGE DRAIN DISTRICT, BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, ETC., et al.

PETITIONERS' SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR REHEARING

The pending petition for rehearing of the court's order denying certiorari has not been acted upon, we believe, because the court has deemed it necessary to await the opinion of the Michigan Court of last resort in the similar case of *City of Highland Park v. Clark.* Opinions of the Michigan Court have been received and a copy thereof as

submitted to counsel appears in briefs filed by respondents in the related cases of *Keefe, et al. v. Martin Drain and Branches Drain District, No. 289,* and *Keefe, et al. v. Centerline Relief Drain District, No. 290.* We urge the following action by this court:

1. **ACTION BY THIS COURT SHOULD BE DEFERRED UNTIL IT IS KNOWN THAT THE OPINIONS AS FILED BY THE MICHIGAN SUPREME COURT, IN CITY OF HIGHLAND PARK v. CLARK, ARE FINAL AND OFFICIAL.**

We refer the court and counsel for respondents to what was said under this title in our reply to the brief filed by respondents in the companion case of *Keefe v. Martin Drain and Branches Drain District, No. 290.* As we there point out, it is likely that the opinion in the City of Highland Park case may be changed in some respects, and furthermore, until the Michigan Court acts upon the motion for rehearing which the relators in that case have filed, it is not known that this is the final word of the Michigan Court on the issues involved. In the brief filed by us in the Martin case, we have set up in full the motion for rehearing presented to the Michigan Court, and brief in support thereof.

2. EVEN IF THE STATE COURT'S OPINION REMAINS IN SUBSTANTIALLY THE SAME FORM AS THE ONE ON FILE, IT DEMONSTRATES THE TRUTH OF PETITIONER'S CONTENTION THAT THE LOWER COURT ERRED IN DETERMINING LOCAL LAW.

(a) The essential and necessary step in the lower court's reasoning was that decrees and opinions in *Meyering Land Co. v. Spencer*, 273 Mich. 703, and *Detroit Fire and Marine Insurance Co. v. Oakland County*, 284 Mich. 130, constituted a former adjudication of bondholders' rights. The lower court said (R. 461):

> "The officers of the drain district represented all creditors of the district, including the bondholders, in the state court cases, and thus appellants (appellees) had notice and were given their day in court in those cases."

Because of this, the lower court said later:

> "Those cases are *res judicata* as to the determinative facts of this controversy."

This point is flatly contradicted by the Michigan Court. It says (see p. 9 of respondents' supplemental brief in the Martin case):

> "We do not say that the Village of Oak Park case, *supra*, is *res judicata* of the rights of these relator bondholders, nor do we hold that they had their day in court through representation of the drain commissioner, who was the defendant in that action."

While it held that the Oak Park case, which involved the same improvement, is a precedent which it should follow, that reasoning cannot be applied here. In the Michigan decision it was based on the proposition that "no facts are adduced in this case outside of those before us in *Village of Oak Park v. Van Wagoner.*" The District Court

held that these improvements are sewers rather than drains, but not upon grounds or facts considered by the State Court. The Master's report shows different facts (R. 85). Petitioners, in the lower court, strenuously objected to the conclusion that the two Bloomfield drains are illegal, demanding a consideration of the question of the sufficiency of the evidence in law to support the District Court's conclusion. The lower court did not give this consideration because it thought, erroneously, as it now appears, that the prior State Court cases were *res judicata.* Had it not been for this erroneous view, it is logical to expect that it would have followed the course previously pursued by it in *Royal Oak Drain District v. Keefe,* 87 Fed. (2) 786, and considered the sufficiency of the evidence.

(b) The lower court rejected the authority of *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, saying that "the villages themselves took part in the false recital" (R. 461). The Michigan Supreme Court, however, accepts these cases as authorities which would rule the decision in all cases involving drain bonds *bona fide* held, where the bonds themselves contained no notice of infirmity.

In this case two issues of bonds are involved, those of the Bloomfield Village Drain District and those of the Bloomfield No. 1 Storm Sewer Drain District. In the first described issue there can be no claim that the bonds themselves contained notice of an infirmity. They state on their face merely that the proposed project is to be a drain. Nowhere in the proceedings or the bonds is the project called a "storm sewer drain" (R. 19, 421). It is, therefore, apparent that applying the rule set forth in the Michigan opinion, these bonds carried a false pretense entitling purchasers to the benefit of the estoppel rule declared and applied in *Thompson v. Village of Mecosta (supra).*

In respect to the other issue, it might superficially appear that the lower court reached a correct conclusion, although under a wrong reason, because the words, "storm sewer drain" were used in the bonds and proceedings. However, in the record in this case we have an explanation of the term, "storm sewer." One of the engineering witnesses defined the term as follows (R. 179):

> "The word 'storm' is used in front of 'sewer' as 'storm sewer.' That always means a sewer or drain which really is a drain, but it always means a conduit that is used primarily for drainage of waters. The term 'storm sewer' as a term to indicate a storm water drain is more common in well built up cities. Oftentimes it gets incorporated into city charters to distinguish that type of conduit from the sanitary sewers and the storm sewers of the city. The storm sewers being purely drains and being designed to take care of the surface water runoff, and the sanitary sewers being designed and used to collect and dispose of sewage but both being called sewers."

Nowhere does it appear that respondents took issue with this statement or claimed that the name applied to the project carried any significance. The contest occurred over whether the project was intended to serve primarily as a sanitary sewer. With the record in this case showing that a "storm sewer" is primarily a drainage improvement, it must follow that the name given to the improvement emphasized the information contained in the bond recitals that a legal purpose was intended.

We, therefore, submit that as to both issues of bonds it is now apparent that if the Michigan Court had before it all the facts shown in this case, it would hold the drain districts estopped to plead the falsity of their bond recitals.

(c) Recognition of the authority of *Thompson v. Mecosta (supra)*, and other Michigan cases of like import,

and the authorities cited therein, necessarily controverts the lower court's theory that the recitals in these bonds did not have such form as to make them inconsistent with the claim that the improvement was not to be a drain. In the Thompson case, the recital was merely compliance with the governing law. Here the bonds not only recite compliance, but add the further statement of the due happening, existence and performance of all acts and events essential to their validity.

It cannot be doubted that had the lower court known the views of the Michigan Court of last resort, as expressed in this opinion, it would have eliminated from its opinion its determination that a decree in a prior suit was *res judicata,* that a drain district's bonds with recitals such as these do not carry a false pretense, and that such bonds would not estop the district to assert that the improvement built with their proceeds was not a drain. With these propositions eliminated, we believe it logical to infer that the lower court would have affirmed the district court's decree.

We submit that the opinion of the state court demonstrates vital errors by the lower court in its assumption that local law required it to reverse the district court in this case. Local law, in its application to drain bonds and the facts in this case, is now known, or will be as soon as this opinion of the Michigan Court becomes final and official. Therefore, the petition for rehearing and petition for certiorari should be granted, and the case reversed and remanded to the lower court, with directions to decide the case in accordance with the now known principles of local law.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

Office - Supreme Court, U. S.
FILED
MAR 23 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Bloomfield Village Drain District and Bloomfield No. 1 Storm Sewer Drain District,
Petitioners,
vs.
BLOOMFIELD VILLAGE DRAIN DISTRICT, BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, etc., et al.,
Respondents

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

JAMES R. BREAKEY, JR.,
1214 Majestic Building,
Detroit, Michigan,
Counsel for Respondents.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Bloomfield Village Drain District and Bloomfield No. 1 Storm Sewer Drain District,
Petitioners,
vs.
BLOOMFIELD VILLAGE DRAIN DISTRICT, BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, etc., et al.,
Respondents

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Heretofore this Court denied the Petition for a Writ of Certiorari in this matter. After denial, counsel for petitioners moved for a rehearing, repeating their claim, that the Circuit Court of Appeals misinterpreted Michigan law.

This, petitioners asserted would be proven by a forthcoming decision of the Supreme Court of Michigan in the pending case of *City of Highland Park, et al.* against *Earl L. Clark, Drain Commissioner of Oakland County.* This Michigan case is a mandamus proceeding, commenced by the same attorneys who represented petitioners herein in the lower courts, after this Court had denied certiorari herein. Counsel for petitioners urged upon this Court that in the case to be decided, the Supreme Court of Michigan would state what the law of Michigan applicable to the present matter really was. We assume this Court as a result has withheld action upon the petition for rehearing.

The Supreme Court of Michigan in Highland Park v. Clark Has Approved the Circuit Court's Interpretation of Michigan Law Herein

On February 11, 1942, the Supreme Court of Michigan decided the Highland Park-Clark case. It held the drain bonds there involved were void, for the same reasons given by the Circuit Court of Appeals in the instant case, viz: the proceedings taken by the Drain Commissioner were without jurisdiction on his part and void; consequently bonds issued as part of such proceedings were also void. Thus the Supreme Court of Michigan decided the Highland Park-Clark case completely in accord with the 6th Circuit in the present matter, holding that bond recitals of full compliance with law did not estop denial of validity of the bonds, where there was a total lack of jurisdiction to act. The complete opinion of the Michigan Supreme Court has been made a part of a brief filed in this matter by counsel for Nine Mile-Halfway Drain District, a companion case of the present one. That opinion being on record, we shall not encumber the record further by attaching it to this brief.

The Supreme Court of Michigan Has Affirmed Highland Park v. Clark on Rehearing

After the Supreme Court of Michigan decided the Highland Park-Clark case, and in positive language approved the decision of the Circuit Court of Appeals in the instant case, this Court was informed of the action by counsel for the Nine Mile-Halfway Drain District, who urged this Court to deny the pending petition for rehearing. A further brief was at the same time filed by counsel for petitioners, who claimed the law of Michigan was not yet settled, because they had filed a petition for rehearing in the Highland Park-Clark case. They requested this Court to delay action further until the Michigan Supreme Court by its action on their rehearing petition finally stated what the law of Michigan was.

On March 17, 1942, the Supreme Court of Michigan denied the petition for rehearing in the Highland Park-Clark suit. The denial of rehearing was without further opinion.

The Supreme Court of Michigan now having placed its approval in no uncertain terms, and surely with finality, upon the questions of drain law involved in the instant case, and the question of estoppel to deny recitals in bonds, there is no reason for longer delaying action in this Court.

No Ground for Certiorari Exists

In our previous brief, we asserted petitioners presented no recognized reason for the issuance of a writ of certiorari herein. We pointed out that no Federal question was involved, and we believe it is conceded by counsel for petitioners that the only alleged basis for the writ was, that the Circuit Court of Appeals had misconstrued Michi-

gan law. This Court undoubtedly denied the petition for a writ, because it clearly appeared that the Circuit Court of Appeals had correctly applied the principles of law as had been established by the Supreme Court of the State of Michigan. Undoubtedly too, this Court withheld action on the petition for rehearing until the Supreme Court of Michigan passed upon the Highland Park-Clark case, because of petitioners' urgent request, and until it was certain that the Circuit Court of Appeals had properly interpreted and applied the law of Michigan in the instant case. After the opinion of the Supreme Court of Michigan in the Highland-Park-Clark case, and after the denial by the same court of a petition for rehearing, there should be no doubt about the law of Michigan in the instant case.

Reply to Petitioners' Last Brief

In the most recent brief filed herein by counsel for petitioners, entitled "Petitioners' Supplemental Brief Supporting Petition for Rehearing," it was claimed (page 2):

> "Action by this Court should be deferred until it is known that the opinions as filed by the Michigan Supreme Court, in *City of Highland Park v. Clark,* are final and official."

That has now been firmly and finally decided, and there should be no reason for further delay.

In this last mentioned brief, petitioners also state (page 3):

> "Even if the State Court's opinion remains in substantially the same form as the one on file, it demonstrates the truth of petitioners' contention that the lower court erred in determining local law."

Under this second heading, petitioners' counsel apparently argue that in spite of the Highland Park-Clark decision, this Court should still grant a writ of certiorari. This is directly in conflict with what they previously represented to this Court, when they urged delay until the law of Michigan would be finally settled in the Highland Park-Clark case. Apparently, petitioners' counsel are arguing that this Court should still refuse to accept the Supreme Court of Michigan's statements of applicable Michigan law, in spite of the unambiguous language in which that Court put its approval upon the law of Michigan as interpreted by the Circuit Court of Appeals in the present case. It is somewhat ironic too, after securing an expression of Michigan law at their own request and for the specific purposes of this present case, that petitioners now apparently ask this Court to ignore it.

In view of this position, we should for a moment consider this situation. Petitioners' counsel say that the Circuit Court of Appeals was in error, when it held previous Supreme Court decisions of Michigan *res adjudicata* of matters in the Bloomfield and Nine Mile cases. The Supreme Court of Michigan in the Highland Park-Clark case held that the previous decision there involved was *stare decisis* of the Highland Park-Clark case, having the bare record and no additional testimony before it. It did not hold as the Circuit Court of Appeals, following the Kersh Lake case previously decided by this case, that those matters were *res adjudicata*. However, the opinion of the Circuit Court of Appeals herein would have been exactly the same if it had not held previous decisions to be *res adjudicata*, or, even if it did not hold the previous decisions to be *stare decisis. This is so because in the instant cases, detailed and minute testimony was taken concerning the nature of the structures themselves.* From

this detailed evidence, the Master and the District Judge specifically found that the drain proceedings involved were illegal and beyond the jurisdiction of the Drain Commissioner. This conclusion was reached, not by holding previous decisions of the Michigan Supreme Court *res adjudicata,* but strictly upon the facts themselves and the previous Michigan constructions of Michigan Drain Law. The Master, the District Judge, and the Circuit Court of Appeals all held in arriving at this conclusion, that previous Michigan decisions declaring the law of Michigan, where a Drain Commissioner exceeded his jurisdiction, were binding upon them by virtue of this Court's decision in the now well known case of *Erie Railroad Company v. Tompkins,* 304 U. S. 64; 82 L. Ed. 1188. The Master and the District Judge made their conclusions of illegality of the projects solely upon the evidence before them. Hence, regardless of *res adjudicata,* those findings of fact stand alone.

The decision of the Circuit Court of Appeals in the instant cases would be the same whether the matter of *res adjudicata* and the Kersh Lake case were mentioned at all. Consequently, the fact that the Supreme Court of Michigan said previous decisions were *stare decisis,* while the Circuit Court of Appeals following the Kersh Lake case said they were *res adjudicata* makes no difference whatsoever, and regardless of previous decisions in the instant cases, the projects would be held illegal. To reopen this phase of the situation in this Court, would require a finding, first, that the Master was clearly in error in his finding on the subject, and a further conclusion that the District Judge was also in error when he reached that conclusion of illegality based upon the actual testimony and facts in the record before him. The illegality of the projects involved here stands unaffected by either the *stare decisis* or the *res adjudicata* doctrine.

Surely a requested redetermination of facts is not a ground for granting a writ of certiorari by this Court. The determination of facts made in the court below is identical with the determination on identical facts made by Michigan Circuit Courts, and approved by the Supreme Court of Michigan in cases involving these identical projects. Such determinations are far from erroneous.

Counsel for petitioners in their most recent Supplemental Brief further argue that the Supreme Court of Michigan in the Highland Park-Clark decision must be wrong as to what was meant by *Thompson v. Village of Mecosta,* 127 Mich. 522. Counsel argue that Justice Bushnell in his opinion lays stress upon the fact that the words "storm sewer" were used in the proceeding involved in Highland Park-Clark. Counsel argue that therefore the Supreme Court of Michigan's decision in Highland Park-Clark was based upon the fact that the word "sewer" was used in the title of the structure and in the bonds themselves, which upon their face show that a sewer was being constructed which was beyond the jurisdiction of the Drain Commissioner. Justice Bushnell did lay stress upon this fact, and counsel for petitioners now state that this Court should not accept the Highland Park-Clark case because only one of the structures involved in the Bloomfield-Nine Mile Halfway cases involved the words "storm sewer." This argument is shallow and specious. Justice Bushnell in his Highland Park-Clark opinion very clearly stated that where there was a total lack of power to act, recitals in bonds did not estop a denial of their validity. That is the exact proposition upon which the Circuit Court of Appeals decided this present case. In Justice Boyles' opinion in the Highland Park-Clark case, he also stated that in Michigan where there was a total lack of power to act, recitals in bonds did not estop denial of their validity.

The argument in this respect is shallow because it attempts to lead this Court on a bypath of no consequence, and to have this Court ignore the substantial meaning and import of the decision.

These Identical Arguments Were Presented to the Supreme Court of Michigan on Petition for Rehearing of the Highland Park-Clark Case

In the motion for rehearing filed in the Supreme Court of Michigan in the Highland Park-Clark case, Voorheis, Long, Ryan & McNair, Dykema, Jones & Wheat, and Thompson, Wood & Hoffman, attorneys for petitioners herein in the Circuit Court of Appeals and Lower Court cases said (page 5):

> "As this court knows, this is but one of many controversies of a similar nature, and what this court says probably will affect the final outcome of *Bloomfield Village Drain District v. Keefe,* 119 Fed. (2) 157, which still remains unsettled. The Supreme Court of the United States has held petitions for reconsideration of its order denying certiorari for about three months, undoubtedly because it feels that it should not decide a question of local law of so much importance until this case is decided. We foresee perplexity both by that court and lower courts in this state which will have similar cases before them, to know whether emphasis on the term 'storm sewer drain' is vital. This is only one of a few cases where that term is used. Does the decision mean that if the title of the improvement was merely Royal Oak No. 7 Drain, the *bona fide* holder would be protected? It is peculiarly important in the matter before the United States Supreme Court because five issues of bonds are there involved, only one of them using the term 'storm sewer drain.' We respectfully urge the desirability of clarifying this point."

In view of the foregoing statement, which was placed squarely before the Supreme Court of Michigan, when it considered a rehearing of the Highland Park-Clark case, there can be little doubt about the Michigan Court denying the requested rehearing with full knowledge that the decision it was making would directly affect the instant cases before this Court.

John P. O'Hara, one of the attorneys in the Bloomfield Village Drain District cases in the lower courts, filed a brief *amicus curiae* in the Highland Park-Clark rehearing matter. In this brief *amicus* stated:

> "On page 5 relators state that they earnestly request the rehearing in order that certain erroneous conceptions disclosed by the two opinions in this case, can be corrected. They proceed further to point out that the Supreme Court of the United States in the Bloomfield Village case, *et al.* will be unable to understand the law of the State of Michigan unless a rehearing is granted."

Further in this brief the following was urged upon the Supreme Court of Michigan:

> "We cannot see how the Supreme Court of the United States could have the slightest doubt of the meaning of the opinion in the instant case, because in the opinion of Justice Boyles, concurred in by all of the Justices of this Court, including Justice Bushnell, it is stated:
>
> > 'The Federal courts likewise recognize the Michigan rule, here repeated, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction. *Bloomfield Village Drain District v. Keefe,* and four other cases (U. S. Circuit Court of Appeals (6th Circuit), March 14, 1941), 119 Fed. (2d) 157.'

In addition to both opinions, Judge Bushnell's and Justice Boyles', stating that where there is want of jurisdiction, estoppel to deny recitals does not arise, which is exactly what the Circuit Court of Appeals said in the Bloomfield cases, this Court also placed its approval upon the two decisions of the Circuit Court of Appeals, which dealt with Michigan drain bonds, the Royal Oak case and the Bloomfield case. The instant decisions arrived at identically the same conclusions as those reached by the Circuit Court of Appeals. This Court once more affirmed its reasons for deciding drain cases in the past, namely, that where the primary purpose was a sewer the proceedings were void, and where the primary purpose was a drain, the proceedings were valid.

It is difficult to see how any Court could be either misled or unable to understand the clear and unambiguous meaning of the two decisions in the instant case. On the main point they both very clearly state that where there is a total lack of jurisdiction on the part of the Drain Commissioner, his recitals do not create an estoppel.

CONCLUSION

We respectfully submit that the decisions as written, clearly follow the law, that they sufficiently inform the Supreme Court of the United States of the law of Michigan, and that they should stand."

Several other briefs of like import were also before the Supreme Court of Michigan when it denied rehearing in the Highland Park-Clark case, so there can be no serious argument, that the Michigan Court did not understand its decision was placing either approval or disapproval upon the Circuit Court of Appeals decision in the Bloomfield-Nine Mile cases, the very cases in which this Court is now asked to say the law of Michigan was not properly interpreted.

Conclusion

We urge that this Court deny the petition for rehearing of its previous order denying a writ of certiorari herein. The only reason given for delay by petitioners was that the Circuit Court of Appeals erroneously applied and interpreted Michigan law. This Court was urged to await the Highland Park-Clark decision. That decision was made on February 11th, 1942. It has been reexamined on petition for rehearing and is in complete accord with the decision of the Circuit Court of Appeals, which this Court is now asked to review. In addition, so there might be no mistake about approval of what the Circuit Court of Appeals said in the Bloomfield case, Justice Boyles expressly stated that the Federal Courts recognized the rules in Michigan, and then cited the present Bloomfield case as an example of such understanding. Under these circumstances, there should be no reason for further withholding a denial of the petition for a writ of certiorari herein.

JAMES R. BREAKEY, JR.,
Majestic Building,
Detroit, Michigan,
Counsel for Respondents.